No. 170

In the Supreme Court of the United States

October Term, 1914

DAVID McCORMICK, APPELLANT,

vs.

THE CITY OF OKLAHOMA CITY ET AL., APPELLEES

Appeal From United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF APPELLEES

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DAVID McCORMICK vs. THE CITY OF OKLAHOMA CITY et al.

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STATEMENT OF CASE.

The salient facts herein, from the viewpoint of the appellees, are as follows:

The City of Oklahoma City is and has been, since a time prior to the happening of the matters complained of, a municipal corporation in the State of Oklahoma and as such has had under certain conditions authority to pave and improve its streets and alleys, including intersections, at the

cost of the adjacent property owners. The law provided for a resolution in such cases by the City Council to proceed with the improvements containing such matter as would enable the engineer to prepare the necessary plans and specifications and continued:

"Said resolution shall set forth any such reasonable terms and conditions as the mayor and council shall deem proper to impose with reference to the letting of the contract and the provisions thereof, and the mayor and council shall, by said resolution, provide that the contractor shall execute to the city a good and sufficient bond, in an amount to be stated in such resolution, conditioned for the full and faithful execution of the work and performance of the contract and for the protection of the city and all property owners interested against any loss or damage by reason of the negligence or improper execution of the work, and may require a bond in an amount to be stated in such resolution for the maintenance of good condition of such improvement for a period of not less than five years from the time of its completion, or both, in the discretion of the mayor and council.

"Said resolution shall also direct the City Clerk to advertise for sealed proposals for furnishing the materials and performing the work necessary in making such improvement. * * * At the time and place specified in such notice, the mayor and council shall examine all bids received, and without unnecessary delay award the contract to the lowest and best bidder." Section 725, Snyder's Compiled Laws of Oklahoma.

The law also provided for an appraisement and apportionment of the benefits and the assessments of the adjacent property therewith payable in ten annual installments and for the issuance of improvement bonds to be paid from

such assessments; that they should be sold at not less than par and "which bond or bonds shall in no event become a liability of the city issuing the same." Section 726, Snyder's Compiled Laws of Oklahoma.

October 19, 1908, the mayor and city council adopted a resolution substantially as provided by law providing for the improvement of eighteen of its streets and in said resolution was the following:

"It is further resolved that all the work done and material furnished shall be in strict conformity to the plans and specifications of the city engineer therefor and of the proper quality and tests. That the contractor to whom a contract shall be awarded for the construction of such improvements shall execute to the city a good and sufficient bond in a sum equal to 20% of the contract price conditioned for the faithful performance of the work and the execution of the contract and for the protection of the said city and all property owners against any and all loss or damage by reason of neglect or improper execution of the work and the said contractor shall also execute good and sufficient bond in the sum of 10% of the contract price conditioned for the maintenance of such work in a state of good repair for a period of not less than five years from the date of the completion and acceptance of such work.

"Be it further resolved that the city clerk of said city be and he is hereby authorized and directed to advertise for sealed bids for furnishing the materials and performing the work necessary to and for the improvement of such streets in the manner required by law, each bid to be accompanied by certified check in the sum of 3% of the amount of the bid, to be forfeited to the city in case the successful bidder fails to enter into the contract and give the required bond within the required time."

The specifications thus referred to contained the following:

"All bids for work to be performed under this contract shall be accompanied by a certified check for 3% of Bid.————Dollars ($——), and in case of failure on the part of the successful bidder to enter into contract within twenty (20) days after notice of acceptance of such bid, said check to become the property of the City of Oklahoma City, as liquidated damages for failure to enter into such contract. Upon execution of said contract within said twenty (20) days, said check to be returned to the bidder furnishing it."

October 21 to 31, 1908, the city clerk advertised for bids on this work. In his advertisement was the following:

"Each bid must be accompanied by certified check in the sum of three per cent (3 per cent) of the amount bid, to be forfeited to the city in case the successful bidder fails to enter into a contract and give the required bond within the required time. Contractor will be required to give bond in the sum of twenty per cent (20 per cent) of the contract price, for the faithful performance of said work and the holding of the city harmless from any and all damages which might occur. Bids will be received from both a five (5) year and ten (10) year guarantee. Also the contractor will be required to give a bond in the sum of ten per cent (10 per cent) of the contract price as a guarantee of keeping the pavement in a state of good repair for a period of five (5) years if bids are accepted on a five (5) year guarantee, and in a state of good repair for a period of ten (10) years if bids are accepted on a ten (10) year guarantee. The contractor shall receive for the above work Street Improvement Bonds at par value against the abutting property according to House Bill No. 231, approved April 17, 1908.

"No proposals will be considered on any street which

does not contain a bid upon every item included in the estimate of the City Engineer for such street.

"Council reserves the right to reject any or all bids."

In response to these advertisements Mr. David McCormick, the R. F. Conway Co., and others made bids. Both McCormick and the Conway Co. bid on a five and ten year guarantee. The respective bids of McCormick upon each street concluded as follows:

"I agree to commence work within —— days after signing the contract and to complete same within six months after commencement. Herewith, certified check for ——— ——— ($——) as required.

(Signed) DAVID MCCORMICK,
"Contractor.
By————————, Agent."

McCormick was the lowest bidder on a ten year guarantee and the R. F. Conway Co. was the lowest bidder on a five year guarantee. At a meeting on November 4th the council by a unanimous vote rejected all bids on a five year guarantee. The council then decided to take up the bids street by street and that contracts be awarded the lowest and best bidder and adjourned to two-thirty p. m. A motion was then made to reconsider the action in the forenoon to take up the bids street by street and that contract be awarded to the lowest and best bidder and this motion was lost. Thereupon the bids were taken up street by street and as to each substantially the following appears:

"Moved by Mr. McWilliams, seconded by Mr. McDavie, that the bid of David McCormick being the lowest and best

bid be accepted and he be awarded the contract for the paving of the above described street. Motion carried."

Thereupon—

"Moved by Mr. Helm, seconded by Mr. Workman, that the action of the council in awarding contracts for asphalt paving at the meeting be rescinded. Motion lost."

On November 9, 1908, the following proceedings are recorded:

"Moved by Mr. Highley, seconded by Mr. Helm, that the council reconsider the action taken at meeting held November 4, 1908, 'in rejecting all bids for asphalt pavement based on five year guarantee.' Motion carried.

"Moved by Mr. Highley, seconded by Mr. Corder, that the council reconsider the action taken at the meeting held November 4, 1908, in awarding contracts for all asphalt paving."

The council adjourned to November 10th and then to the 11th, when the city attorney reported that in his opinion "any time before the contracts are signed up by the city and the contractor that the council had the right to rescind its action in awarding said contracts."

Judge Burwell appeared before the council and spoke against the motion and Judge Harris spoke in favor of the same. Thereupon the motion to rescind the action taken at the meeting held November 4, 1908, in awarding contracts for all asphalt paving carried by a vote of six to four. Later Judge Burwell presented eighteen contracts of David McCormick for paving the streets formerly awarded him

and demanded that they be accepted by the council. Thereupon the council took up the bids under the five year guarantee and finding that in the aggregate the bids of the R. F. Conway Co. were some eleven thousand dollars below those of David McCormick, awarded contracts to it. The R. F. Conway Co. presented its bonds and contracts and the council ordered they be approved and accepted.

The city had a form of printed and written contract which was used both by the plaintiff and the R. F. Conway Co. in the preparation of their thirty six contracts.

These contracts contained numerous provisions not in the advertisements, plans and specifications, the bids and their acceptance. These contracts all contained the following provision:

"This contract is entered into subject to the approval or rejection of the council of the City of Oklahoma City, and it shall not bind either party until so approved and confirmed and is subject to all city ordinances now in force relating to such matters."

The plaintiff is president of the Parker-Washington Company and as such had made similar contracts with the same city to an amount exceeding two hundred and fifty thousand dollars. If he knew that such contracts would be expected he agreed thereto prior to tendering the eighteen contracts in question. If he did not understand that by his bid he was agreeing to such contracts as he knew from past experience the city would demand, then there was no meeting of the minds of the parties. If he did so understand,

he knew that the contract contained the provision that "it shall not bind either party until so approved and confirmed."

On November 16th Mr. McCormick brought suit in the State District Court for Oklahoma County against the mayor of Oklahoma City and others, and obtained a temporary restraining order. The R. F. Conway Co. were upon leave of court made defendants. December 4th a demurrer was sustained to the petition and on December 5th plaintiff was granted twenty days to file amended petition and on December 23rd fifteen days additional were granted him and on January 25, 1909, ten days additional were granted to file an amended petition. On the same day the action was dismissed but on January 27th it was reinstated and the suit was still pending after this suit was brought.

The bill sets up the facts, alleges the contract was completed between the plaintiff and the city and prays a decree of specific performance of its alleged contract, a temporary and possibly a permanent injunction and for general equitable relief.

The defendants in answer allege that all that took place between the plaintiff and parties defendant constituted only preliminary negotiations and deny there was ever any completed contract.

Upon full hearing the court dismissed the proceedings and David McCormick appealed to the United States Circuit Court of Appeals (Eighth District), where the action of the

District Court was sustained, from which decision the appellant now brings the case before this court.

Since the filing of the bill the contracts have all been completely performed by the R. F. Conway Co. and of course a decree for specific performance is now out of the question and an injunction is likewise impossible.

Specific References to Printed Record, Supplementing Appellant's Statement of Case.

David McCormick, a resident and citizen of the City of St. Louis and State of Missouri, was complainant below, and the City of Oklahoma City, a municipal corporation, duly organized and incorporated under the laws of the State of Oklahoma; Henry M. Scales, as the Mayor of the City of Oklahoma City; George Hess, as Clerk of the City of Oklahoma City; W. C. Burke, Engineer of the City of Oklahoma City; Mont F. Highley, A. W. McWilliams, W. T. Corder, O. P. Workman, L. L. Land, M. F. Peshek, J. W. Johnston, C. E. McDavie, S. A. Byers and R. F. Helm as Councilmen within and for the City of Oklahoma City, each and all of whom are residents and citizens of the Western Judicial District of the State of Oklahoma, were defendants (See printed Record, pages 6 and 7), and these persons constitute the only defendants in this case. The R. F. Conway Company was not made a party to this action by the complaint nor was it made a party defendant upon its petition filed in the Circuit Court and this cause has proceeded to judgment and decree without the R. F. Conway Company

being in any manner a party to the record. As shown on page 66 of the printed record, the Conway Company asked leave to intervene as a defendant because it had a substantial interest in the result of the suit but no order was made permitting this company to intervene and it is a stranger to the record, and not bound by the decree entered herein. Therefore this suit is to determine the rights of the appellant, David McCormick, on the one hand and the City of Oklahoma City and its officers on the other. The appellant has set out the provisions of the paving law of Oklahoma and the various steps taken by the appellees necessary, under the law, to improve streets and highways and it is needless to enlarge upon that statement.

The attention of this court, however, is called to the notice to paving contractors found at page 143 of the printed record, which reads as follows:

"In accordance with a resolution passed by the Mayor and Council, October 19, 1908, sealed bids will be received at the office of Geo. Hess, City Clerk, up to 5 o'clock p. m., November 2, 1908, and will be considered by the Mayor and council at the council chamber in the city hall at 8 o'clock p. m., on said date for the paving of the following streets according to the plans and specifications now on file in the office of the City Clerk. Bids to be received on each street separately. (Then follows the description of each of the 18 streets involved in this controversy.) Each bid must be accompanied by certified check in the sum of three per cent (3 per cent) of the amount bid, to be forfeited to the city in case the successful bidder fails to enter into a contract and give the required bond within the required time. Con-

tractor will be required to give bond in the sum of twenty per cent (20 per cent) of the contract price for the faithful performance of said work and the holding of the city harmless from any and all damages which might occur. Bids will be received from both a five (5) year and ten (10) year guarantee. Also the contractor will be required to give bond in the sum of ten per cent (10 per cent) of the contract price as a guarantee of keeping the pavement in a state of good repair for a period of five (5) years if bids are accepted on a five (5) year guarantee, and in a state of good repair for a period of ten (10) years if bids are accepted on a ten (10) year guarantee. The contractor shall receive for the above work Street Improvement Bonds at par value against the abutting property according to House Bill No. 231, approved April 17th, 1908.

"No proposals will be considered on any street which does not contain a bid upon every item included in the estimate of the City Engineer for such street.

"Council reserves the right to reject any or all bids.

(SEAL) "Geo. Hess, *City Clerk.*"

Thereafter appellant submitted his sealed bids both on a five and ten year guarantee, the price of asphalt for the same being from five to seven cents per square yard higher for the ten year maintenance than for the five year maintenance. (See printed Record, pages 21 to 32.)

The concluding portion of each of said bids (See page 147 of printed Record), was as follows:

"I agree to commence work within.... days after signing the contract and to complete same within six months after commencement. Herewith, certified check for..... ($.....) as required.

(Signed.) David McCormick,
Contractor.

By ....., Agent."

Upon the reception of the bids of various contractors the question arose before the Council with reference to the award of the contracts upon the five or ten year guarantee, and at the meeting held on November 4th, 1908, in the forenoon of that day, the motion prevailed to award the contracts to the lowest and best bidder based upon the ten year guarantee (See printed Record, page 79), and at the same meeting, or rather an adjournment of that meeting, held at 2:30 p. m. of November 9th, 1908, which meeting was adjourned from day to day until the 11th day of November, motion to reconsider the awards of November 4th was carried (See printed Record, page 89), and that the Council award contracts to the lowest and best bidder for construction of the work based on a five year guarantee. (See printed Record, page 90.) And thereupon each of the bids of R. F. Conway Company for the various streets to be paved being the lowest and best, the awards of the contracts were made to R. F. Conway Company. (See printed Record, page 91.) And on page 92 of the printed record we find the following:

"Mr. Paul: (Reading from page 270).

> The contract and bond of the R. F. Conway Company were read for the paving of 11th street from west line of A. T. & S. F. Ry. to east line of Robinson; Dale avenue from north line of Park Place to south line of 13th street, Park Place from east line of Broadway to east line of Dale avenue, Oklahoma City. Moved by Mr. Highley, seconded by Mr. Land, that the contract and bond be ap-

proved and contract ordered executed. Motion carried by unanimous roll call vote except Messrs. McWilliams, McDavie and Byers voting No. That record continues from page 270 to the bottom of page 274, being the same record with reference to the other streets involved in this litigation.

MR. BURWELL: The same objection and ruling to all of it.

MR. PAUL: We now offer in evidence the eighteen contracts tendered by David McCormick to the City of Oklahoma City on the 16th of November, 1908.

MR. BURWELL: They may be admitted by agreement."

We also wish to call the attention of the court to the testimony of Geo. Hess, City Clerk, found at page 118 of the printed record, showing the manner and custom and understanding of contractors dealing with the city insofar as the intention of the parties is concerned with reference to execution of paving contracts, which reads as follows:

"Q. Mr. Hess, as City Clerk have you ever had any experience in the execution of contracts for paving?

A. Yes, sir.

Q. How many contracts have you executed of that character if you know?

A. I could not state exactly; over a hundred though.

Q. How many contracts have been executed between the city and the paving contractors during your four years as such clerk that have not been revised before written out and signed by you and the Mayor of the city?

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial, has no influence upon the contract in question, no defense in this action.

THE COURT: Overruled; exception noted by complainant.

A. Has not been any.

Q. Have you executed any contracts with the Parker-Washington Company or David McCormick other than formal written contracts for paving work?

A. No, sir.

Q. What is the custom of the City Council with reference to the formalities of entering into these contracts after the acceptance of bids?

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial, the custom of the city would be no defense in this action.

THE COURT: Overruled; exception noted by complainant.

A. The custom has been in the last four years, after the bid is accepted the city attorney is instructed to prepare a contract and the company signs or fills the necessary bonds and presents them to the Council with the contract: then if they are approved the Council instructs the Mayor and Clerk to execute them and place them on file."

We also desire to call the attention of the court to the testimony of Henry M. Scales on the same proposition found at page 123 of the printed record as follows:

"Q. What is the procedure of the City Council, the custom usually prevailing with reference to the acceptance of bids and making awards and entering into formal contracts for paving?

MR. BURWELL: Objected to for the reason the making of contracts by municipalities in Oklahoma is a matter of law, not matter of custom.

THE COURT: Overruled; exception noted by complainant.

A. Why, advertisements for bids or proposals are inserted in a paper and at a stated or given time these proposals are opened in the open council chamber by the City Clerk; the figures are usually ready by our City Engineer as assistant to the City Clerk in that particular character of work. After reading of the bids, upon motion the contract or award is made to a certain firm or bidder; following which the City Attorney prepares a written contract which is signed by the proposer or contractor and at the next meeting of the Council, that contract coming through the Clerk's office is presented to the Council, signed by the contractor and then upon motion the Mayor and City Council are authorized to sign the contract on behalf of the city.

Q. What is the procedure with reference to the bonds that accompany contracts for paving, with reference to their approval or rejection?

A. They are approved also at the time the contract is entered into.

Q. You are acquainted with Mr. McCormick?

A. I am.

Q. Also the Parker-Washington Company?

A. Yes, sir.

Q. How many contracts have been awarded to the Parker-Washington Company or Mr. McCormick during your two years in office, if you know?

A. I could not state accurately.

Q. Been any awarded?

A. Yes, sir.

Q. About how many?

A. Oh, a half dozen at any rate.

Q. What has been the procedure and custom with reference to the execution of formal written con-

tracts with the Parker-Washington Company or McCormick with these contracts awarded to them?

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial, no defense to this action; the law fixes the manner and procedure and custom would not change it.

THE COURT: Overruled; exception noted by complainant.

A. The procedure as already outlined, the same procedure I heretofore outlined. The award made at one meeting of the Council and at the next meeting of the Council is a statement of the contract signed by the Parker-Washington Company with the necessary bond and then motion to authorize the Mayor and City Clerk to enter into contract.

Q. Is that the procedure relative to the execution of the contracts in this instance, with reference to the eighteen streets?

A. What instance do you refer to?

Q. With reference to the Conway Company?

A. Yes, sir.

Thereupon the witness was excused without cross examination."

And upon the same proposition the appellant likewise testifies on page 124 of the printed record as follows:

"MR. PAUL:

Q. Mr. McCormick, you say that you are president of the Parker-Washington Company?

A. I am.

Q. You have bid on work in Oklahoma City and received contracts previous to these contracts that are in controversy here?

A. Yes, sir.

Q. For the Parker-Washington Company?

A. Yes, sir.

Q. Have you ever entered into contract with the city for paving other than by formal written contract?

A. The awards of the contracts have been followed up by written contracts.

Q. In other words, all your contracts for paving have been formally executed and signed by the parties, have they not?

A. We have signed contracts.

Q. And the city signed the contracts too, did they not?

A. Yes, sir."

It became a very important proposition in the trial of this cause as to the right of the City Council to reconsider the motions made under the rules of the City Council, particularly since it was contended that no rule had ever been adopted by the City Council relative to the business thereof. This rule was adopted as shown by the testimony of Geo. Hess, found at page 132 of the printed record, which reads as follows:

"Thereupon George Hess was recalled by the defendants for further direct examination.

By Mr. Paul:

Q. I hand you Council Journal No. 6, I wish you would turn to page 54 of that record and state what you find there with reference to the adoption of any rules of the City Council as to whether or not there are any rules of the City Council on that record?

A. Under date of April 9, 1901, rules from one to nineteen appear.

Q. Does that record show the adoption of those rules?

A. Yes, sir.

Mr. Paul: We now offer this record showing the adoption of these rules, found on pages 54, 55, 56, 57 and 58, together with the action of the City Council adopting the same.

Mr. Burwell: We object to this because the record already introduced here of date in 1902 shows that the rules were adopted at that time.

The Court: Have you compared them with the rules in the printed book which you have identified here?

A. I haven't read over all of them, I think they are the same; I have not proof read them.

The Court: Overruled; exception noted by complainant."

The said record is as follows:

"Oklahoma City, O. T., April 9, 1901.

"Mr. Paul:

"Council met as per adjournment with the Mayor and following councilmen present:

"The following rules for the government of the Council were submitted by Mr. .....: Rules No. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19."

"I particularly desire to call the attention of the court and read rule No. 12 which reads as follows:

"'Rule 12. A question may be reconsidered at any time during the same meeting or the first meeting thereafter. No motion shall be reconsidered more than once nor shall a vote to reconsider be reconsidered but any member of the Council who has voted in the affirmative shall have the right to move for a reconsideration.'"

Those nineteen rules were read by the Clerk; then this record here says:

"Moved by Mr. .....that the rules as read by the Clerk be adopted. Motion to amend by Mr. ..... to strike out the last section of rule 13. Amendment lost by the following roll call vote:..... Question was put upon the original motion and carried by unanimous vote."

Thereupon defendants rest.

It will be observed from the record also that on the 16th day of November, 1908, the appellant herein filed a suit in the District Court of Oklahoma County, for an injunction, which said suit was still pending at the time this suit was begun on January 30th, 1909. We respectfully call the attention of the court to the testimony of J. F. Havens, found at page 132 of the record as follows:

Direct Examination by Mr. Burwell.

"Q. Mr. Havens, you are deputy clerk of the District Court of Oklahoma County?

A. Yes, sir.

Q. I will ask you if you have examined the record in the case of *McCormick* v. *Scales as Mayor of Oklahoma City and Others*, No. 7968?

A. I have.

Q. Is that suit still pending in your court?

A. It is."

Cross Examination by Mr. Paul.

"Q. I wish you would turn to that record of No. 7968 and tell the court what proceedings were had in that cause from that time to this.

A. Well, on November 16 there was a petition filed for injunction; restraining order granted; afterwards motion to modify restraining order filed; afterwards on December 3, demurrer to petition was filed; on December 3 there was an order of court continuing the hearing of the temporary injunction on December 4, the temporary restraining order continued in force; afterwards on the same date upon hearing of the demurrer it was sustained; December 5 the court granted plaintiff leave twenty days to file amended petition; on December 23 the court granted plaintiff leave fifteen days additional to file amended petition; on January 25, 1909, there was an order made granting the plaintiff ten days additional to file amended petition; also order on same date dismissing case at cost of plaintiff; afterwards on January 27, order of court setting aside dismissal on January 25.

Q. Is that all the proceedings?

A. Yes, sir."

After the execution of the contracts and before this suit was begun the Conway Company under and in pursuance to the terms of its contracts with the appellees, performed a large amount of work, some of the streets were completed, all of them in process of construction, and all was with the knowledge of the appellant; and upon this proposition, we invite the Court's attention to the testimony of W. C. Burke, found at pages 93 to 109 of the printed record, and which reads as follows:

"Thereupon W. C. Burke, being first duly sworn, testified on behalf of the defendant as follows:

Direct Examination by Mr. Paul.

Q. State your name to the court?

A. W. C. Burke.

Q. What official position do you hold in Oklahoma City?

A. City Engineer.

Q. You were City Engineer of this city during the month of November, 1908?

A. Yes, sir.

Q. Continuously up to the present time?

A. Yes, sir.

Q. Are you familiar with the streets embraced in this controversy, being eighteen streets, contracts for which were let to the Conway Company and alleged to have been let to McCormick?

A. Yes, sir.

Q. Did you prepare the plans and specifications for the construction of these streets?

A. Yes, sir.

Q. Has any work been done by any person on those streets since the 12th day of November, 1908?

A. Yes, sir.

Q. By whom?

A. By the Conway Company.

Q. Will you tell the court how much work has been done by the Conway Company on these eighteen streets up to the present time?

MR. BURWELL: Objected to as incompetent, irrelevant, and immaterial; in no way affecting the rights of the parties hereto.

THE COURT: Overruled; exception noted by plaintiff.

A. Do you want the condition of each street?

Q. Yes, if you can give that.

A. Second street from Western to Blackwelder is all completed except the asphalt.

Q. What does that mean? What work has been done?

A. That is, the asphalt surface.

Q. What work is done prior to that time?

A. Well, grading, sewers, catch basins, manholes, concrete base and curb and gutter is all in.

MR. BURWELL: I understand I am having an exception to all this testimony without interrupting and repeating my objection every time. I want it to go to all these different streets.

THE COURT: Well, state your objection.

MR. BURWELL: Counsel here objects to any evidence showing any work was performed by the Conway Company for the reason that would be no defense to this action by complainant; incompetent, irrelevant and immaterial.

THE COURT: Objection overruled; exception noted.

Q. What was the contract price of that work for that street?

MR. BURWELL: Objected to for the reason the record is the best evidence.

THE COURT: Overruled; exception noted by complainant.

A. I would have to get hold of some other documents.

Q. You haven't got it there?

A. No. I have got what it amounts to in dollars and cents when it is completed.

Q. That is what I have reference to, when completed what is the contract price of the construction of Second street from the point to the point you have indicated?

MR. BURWELL: Objected to for the reason incompetent, irrelevant, immaterial, not the best evidence.

THE COURT: Overruled; exception noted by complainant.

A. $23,558.25.

Q. Under whose direction is that work being performed?

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial.

THE COURT: Overruled; exception noted by complainant.

A. My direction.

Q. Who furnished the grading stakes and other details for the construction of this work?

A. I did.

Q. Proceed to the next street; tell the court how much work has been completed on the next street, if any?

A. Second street, from Blackwelder to Ohio, grading, sewers, catch basins, manholes, concrete base and gutter and curb is all in.

Q. What is left to be done on that street?

A. Asphalt surface.

Q. What was the total contract price for the construction of the street?

A. $22,501.75.

MR. BURWELL: We move to strike out all the testimony with reference to Second street for the reason incompetent, irrelevant, immaterial, in no way constituting a defense to the action.

THE COURT: Overruled; exception noted by complainant.

Q. In your judgment what would be the cost to complete the work? In other words, what would be

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial.

THE COURT: Overruled; exception noted by complainant.

A. I would have to consult the plans and see the yardage in order to make an intelligent reply to that.

Q. Can you even approximate it at this time?

MR. BURWELL: We object to an approximate statement.

THE COURT: Overruled; exception noted by complainant.

A. I would say one-third of that amount would surface it.

Q. One-third of the amount for surface?

A. Yes, sir.

Q. Turn to the next street involved in this litigation and tell us what work if any has been done by the Conway Company under your direction?

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial, any work done by the Conway Company was done subsequent to the award of the contract to complainant.

THE COURT: Overruled; exception noted by complainant.

A. Third street from the west line of Lee avenue to the west line of Carey and Weaver's addition.

Q. What work remains to be done on that street, if any?

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial.

THE COURT: Overruled; exception noted by complainant.

A. Grading, curb and gutter is in.

Q. What was the contract price?

A. $2,362.75.

Q. How much work has been done on that contract in dollars and cents, as near as you can judge?

A. I should think about $800.00.

Q. Turn to the next street and tell how much work if any has been performed by the Conway Company?

A. Fifth street from the west line of Walker to the east line of Western avenue.

Q. What work if any has been done on that street?

MR. BURWELL: We object to any work done by Conway Company subsequent to the awarding of the contract to complainant as no defense to this action, incompetent, immaterial.

THE COURT: Overruled; exception noted by complainant.

A. Sewer, curb and gutter and grading is completed.

Q. In dollars and cents what is that, the amount of work already done, what does it amount to?

MR. BURWELL: Same objection.

THE COURT: Overruled; exception noted by complainant.

A. The final estimate of work to be done on that street was $24,196.00 and the amount of work done on that street is about $7,000.00.

Q. Turn to the next street.

A. Sixth street from Robinson to Walker.

Q. What, if any, work has been performed by the Conway Company under its contract on the street?

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial as to any work done subsequent to

the awarding of the contract to the complainant, no defense to this action.

THE COURT: Overruled; exception noted by complainant.

A. Grading, sewers, manholes, catch basins, and curb and gutter.

Q. What was the final estimate of the cost of that street?

A. $11,677.00.

Q Of that amount how much work has been performed in dollars and cents?

A. About $3,000.00.

Q. Take the next street, give a description of the street, and tell how much work, if any, has been performed by the Conway Company?

A. Sixth street, from Walker to Lee; grading and curbing and gutter is in; final estimate amounts to $7,590.75; there is about $2,000.00 worth of work done.

MR. BURWELL: We move to strike out the question and answer as incompetent, irrelevant, immaterial, any work done by the Conway Company being subsequent to the award of the contract to plaintiff.

THE COURT: Overruled; exception noted by complainant.

Q. Take the next street.

A. Sixth street, from Phillips to Kelley avenue.

Q. What work has the Conway Company performed under its contract on that street? How much?

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial, any work done by the Conway Company no defense to this action.

THE COURT: Overruled; exception noted by complainant.

A. Grading, sewers, catch basins, manholes, curb and gutter and concrete base are in.

Q. What is the amount of work done?

A. The final estimate would be $9,389.00, and about $6,000.00 worth of work done.

Q. Take the next street?

A. Seventh street from Stiles to Stonewall.

Q. What work, if any, has the Conway Company done on the street and how much?

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial to any work done by the Conway Company under an alleged contract awarded subsequent to plaintiff's contract, no defense to this action.

THE COURT: Overruled; exception noted by plaintiff.

A. Grading, sewers, manholes, catch basins, curb and gutter, and concrete base is in; the final estimate would be $31,084.00 and the work completed amounts to about $2,200.00.

Q. The next street?

A. Ninth street, from Dewey to Shartel, grading and curbing and gutter.

Q. What if any work has the Conway Company done on this street, how much in dollars and cents?

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial.

THE COURT: Overruled; exception noted by complainant.

A. Grading, curbing and gutter is in; the final estimate would be $8,388 and the amount of work done about $2,000.

Q. What is the next street?

A. Sixteenth street from Shartel to McKinley.

Q. What if any work has the Conway Company done on that street and how much in dollars and cents?

A. Grading, sewers, catch basins, manholes, curb and gutter and concrete base; final estimate would be $26,504.00; about $17,000.00 worth are completed.

Q. Give us the next street?

A. Nineteenth street, from Dewey to Western.

Q. What if any work has the Conway Company done on that street, and if so, how much in dollars and cents?

Mr. Burwell: Objected to as incompetent, irrelevent, immaterial, any work done by the Conway Company under an alleged contract subsequent to the awarding of the contract to complainant and no defense to this action.

The Court: Overruled; exception noted by complainant.

A. That street is completed.

Q. What was the final estimate of the cost?

A. $19,703.

Q. By whom was it completed?

A. The Conway Company.

Q. Give us the next street?

A. The Classen Boulevard, from Sixteenth to Thirty-seventh street.

Q. What if any work has been done on that street, give us the amount of it?

Mr. Burwell: Objected to as incompetent, irrelevant, immaterial as to any work claimed to have been done by the Conway Company under an alleged contract subsequent to the plaintiff's contract, no defense to this action.

The Court: Overruled; exception noted by complainant.

A. There is part of the grading done, all of the sewers are in and part of the curb and gutter; the final estimate of that street would be $147,498.00 and the amount of work done on that street would amount to about $20,000.00 at the present time.

Q. Give us the next street?

A. California avenue, from Shartel to Western.

Q. What amount of work has the Conway Company put on that street and if any, how much?

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial and as above.

THE COURT: Overruled; exception noted by complainant.

A. That street is completed by the Conway Company.

Q. What was the final estimate?

A. $11,424.00.

Q. Give us the next street?

A. Eighteenth street, from Dewey to Shartel; Dewey from 17th to 19th and Lee from 17th to 19th.

Q. All that embraced in one contract?

A. Yes, sir.

Q. What if any work was done by the Conway Company on these three streets embraced in that contract, and if so, how much?

MR. BURWELL: Objected to for the reason the work claimed to be done by the Conway Company was under an alleged contract subsequent to the award of the contract to complainant and is no defense to this action, incompetent, irrelevant and immaterial.

THE COURT: Overruled; exception noted by complainant.

A. Those streets are completed by the Conway Company.

Q. What if any work has the Conway Company done on that street and how much in dollars and cents?

A. Grading, sewers, catch basins, manholes, curb and gutter and concrete base; final estimate would be $26,504.00; about $17,000.00 worth are completed.

Q. Give us the next street?

A. Nineteenth street, from Dewey to Western.

Q. What if any work has the Conway Company done on that street, and if so, how much in dollars and cents?

Mr. Burwell: Objected to as incompetent, irrelevent, immaterial, any work done by the Conway Company under an alleged contract subsequent to the awarding of the contract to complainant and no defense to this action.

The Court: Overruled; exception noted by complainant.

A. That street is completed.

Q. What was the final estimate of the cost?

A. $19,703.

Q. By whom was it completed?

A. The Conway Company.

Q. Give us the next street?

A. The Classen Boulevard, from Sixteenth to Thirty-seventh street.

Q. What if any work has been done on that street, give us the amount of it?

Mr. Burwell: Objected to as incompetent, irrelevant, immaterial as to any work claimed to have been done by the Conway Company under an alleged contract subsequent to the plaintiff's contract, no defense to this action.

The Court: Overruled; exception noted by complainant.

A. There is part of the grading done, all of the sewers are in and part of the curb and gutter; the final estimate of that street would be $147,498.00 and the amount of work done on that street would amount to about $20,000.00 at the present time.

Q. Give us the next street?

A. California avenue, from Shartel to Western.

Q. What amount of work has the Conway Company put on that street and if any, how much?

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial and as above.

THE COURT: Overruled; exception noted by complainant.

A. That street is completed by the Conway Company.

Q. What was the final estimate?

A. $11,424.00.

Q. Give us the next street?

A. Eighteenth street, from Dewey to Shartel; Dewey from 17th to 19th and Lee from 17th to 19th.

Q. All that embraced in one contract?

A. Yes, sir.

Q. What if any work was done by the Conway Company on these three streets embraced in that contract, and if so, how much?

MR. BURWELL: Objected to for the reason the work claimed to be done by the Conway Company was under an alleged contract subsequent to the award of the contract to complainant and is no defense to this action, incompetent, irrelevant and immaterial.

THE COURT: Overruled; exception noted by complainant.

A. Those streets are completed by the Conway Company.

Q. What was the final estimate of the cost?

A. $19,487.00.

Q. Give us the next street?

A. The next street is Walker avenue from 13th to 16th.

Q. What if any work has the Conway Company done on this street? If any, how much?

MR. BURWELL: Objected to for the reason any work claimed to be done by the Conway Company was under an alleged contract subsequent to the award of the contract by the City Council to the complainant and is no defense in this case: incompetent, immaterial, irrelevant.

THE COURT: Overruled; exception noted by complainant.

A. The street is completed.

Q. What was the final estimate of the cost?

A. $8,588.00.

Q. What was the next street?

A. Washington avenue, from Broadway to Robinson.

Q. What if any work has the Conway Company performed on that street? If any, how much?

MR. BURWELL: Objected to for the reason that work claimed to be done by the Conway Company under an alleged contract subsequent to the awarding of the contract to the complainant is no defense to this action: incompetent, irrelevant and immaterial.

THE COURT: Overruled; exception noted.

A. The street is completed.

Q. What was the final estimate of cost?

A. $3,220.00.

Q. What is the next street?

A. Washington, from Robinson to Walker.

Q. Any work been performed by the Conway Company on that street?

MR. BURWELL: Same objection as above.

THE COURT: Overruled; exception noted by complainant.

A. Yes, sir.

Q. Is the street completed?

A. Yes, sir.

Q. What was the final estimate of cost?

A. $11,285.00.

Q. What was the next street?

A. Phillips avenue, from 4th to 10th.

Q. What if any work has the Conway Company performed on this street?

MR. BURWELL: Objected to for the same reason.

THE COURT: Overruled; exception noted by complainant.

A. Grading, sewers, manholes, catch basins, curb and gutter and concrete base is in.

Q. What is the final estimate of the cost and how much work has been done by the Conway Company?

A. The final estimate would be $16,334.00 and the amount of work done would be worth $12,000.00.

Q. Any other streets now of this eighteen?

A. No, sir.

MR. BURWELL: Defendant moves to strike out all the testimony of this witness pertaining to work claimed to be done on these streets and the estimates of cost of the work already constructed, for the rea-

son if made at all it was made under a contract subsequent to the awarding of the contract to the complainant for these particular improvements, and no defense to this action; incompetent, irrelevant and immaterial.

THE COURT: Overruled; exception noted by complainant.

Q. Mr. Burke, do you know when the Conway Company commenced work, constructing these streets.

MR. BURWELL: Objected to for the reason any work done by the Conway Company was under a pretended contract entered into subsequent to the award of this contract to this complainant, and no defense to this action, incompetent, immaterial.

THE COURT: Overruled; exception noted by complainant.

A. About the 15th of November.

Q. Are they still at work?

A. Yes, sir.

Q. Do you know how many men they have employed here in the construction of this work?

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial, no defense to this action.

THE COURT: Overruled; exception noted by complainant.

A. My record shows about 700 men.

Q. Know what machinery, if any, they have here in the construction of this work?

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial as to any work performed under an alleged contract subsequent to the award of the contract to complainant, being no defense here.

THE COURT: Overruled; exception noted by complainant.

A. They have two large asphalt plants, three concrete mixers, three steam rollers and all the tools that naturally go with that class of work; asphalt wagons, rock wagons, teams, such things as that; of course, they hire a great many of the teams; they have some of their own, however.

Q. You are acquainted with David McCormick?

A. Yes, sir.

Q. I will ask you what if any grade stakes or other things you have given him for the purpose of constructing any of these eighteen streets?

A. None.

Q. Can you tell the court what the average daily expense of conducting this work is to the city and the Conway Company?

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial and no defense to this action.

THE COURT: Overruled; exception noted by complainant.

A. The labor account is approximately about $2,000 a day, I should judge, and the amount of material they use daily in the way of rock, sand, cement, asphalt, I think about $1,800 or $2,000 worth of material a day.

Q. You, of course, inspect all the material they use in the construction of these streets?

A. Yes, sir.

Q. Are you familiar with the amount of material the Conway Company has on hand at this time for the purpose of constructing these streets?

MR. BURWELL: Objected to as incompetent, irrelevant, immaterial and no defense to this action.

THE COURT: Overruled; exception noted by complainant.

A. I believe they have enough material on hand to complete all these contracts.

Q. In dollars and cents what would that amount to; in your best judgment, of course?

A. You are speaking now of the material on hand?

Q. Yes, sir.

A. I would say $40,000.00.

Q. What effect does the incomplete condition of these streets you have testified concerning have upon the travel with reference to being open or closed for travel?

A. Well, when we turn a street over to the contractor he has possession of that street and he is responsible for it.

Q. During the process of construction are these streets open for travel?

A. No, sir; they are barricaded.

Q. Were they very much traveled streets or otherwise, those that are closed at this time?

MR. BURWELL: Objected to as calling for conclusion, not statement of fact.

THE COURT: Overruled; exception noted.

A. Oh, they are all traveled more or less, some of them more than others.

Cross Examination by Mr. Burwell.

Q. Mr. Burke, you say that you never furnished any grade stakes to David McCormick for the doing of any of this work, on any of these eighteen streets. Mr. McCormick told you he wanted grade stakes and expected to carry out his contract, didn't he?

A. No, sir.

Q. Did he never talk to you about grade stakes or things of that kind?

A. No, sir.

Q. You are sure of that?

A. Yes, sir; I am sure of it.

Q. Were you present in the City Engineer's office when Mr. McCormick personally spoke to those in charge with reference to grade stakes?

A. No, sir.

Q. You were not?

A. No, sir.

Q. You don't say that was not done, but you don't know of it?

MR. CHAMBERS: We object to that.

THE COURT: Overruled.

A. I could not answer what he said to others; I said he didn't say it to me.

Q. You say there are about seven hundred men at work at this time on these streets?

A. Yes, sir.

Q. If the work were to cease they would be relieved from employment and the Conway Company would not suffer by reason of having to pay these men?

MR. PAUL: We object to asking for conclusion, not statement of fact.

THE COURT: Sustained.

Q. Are you acquainted with the custom of construction companies with reference to whether or not they pay their employees when not actually employed on the work?

A. There is lots of them that are paid regularly, whether employed or not.

Q. Are the ordinary laborers paid?

Mr. Paul: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled; exception noted by defendant.

A. Some of them are; it depends on circumstances. Now, I cannot testify from absolute personal knowledge in this particular case, but before there was any litigation or any question about expense or anything like that came up, I was informed by the Conway Company manager or superintendent that a certain number of the men he brought from Chicago which he calls his experts at their particular vocation; they get regular full time whether they work or not.

Q. How many of those are there employed at this time?

A. I should judge of that class there is possibly one third of this concrete force.

Q. How many are there on the concrete forces?

A. I think about 75 or 80 men on the three gangs.

Q. And one-third would be about twenty-five men?

A. Yes, sir.

Q. What do all these other men do?

A. Now at the asphalt plant, there are quite a number of men there that are monthly men, in fact, hired men about all the time, so I am informed.

Q. You don't know about that?

A. No, sir; so I am informed. Understand now, I don't know to my own personal knowledge that how these other men are paid except what I have been told about it.

Q. You do know and isn't it a fact that these construction companies doing paving work hire quite a number of other men who when laid off do not receive pay?

A. Yes, sir.

Q. Now, the material which is consumed upon the work from day to day that would not be lost, that would not be lost, that would keep—

A. They have lots of that material delivered on these different streets in advance of the machines.

Q. How long in advance?

A. Sometimes a couple of weeks.

Q. Well, that is gravel?

A. That is rock and sand.

Q. That would not be destroyed by delay?

A. Well, to a certain extent. They might be to the cost of taking it off again.

Q. But the material itself would not be destroyed by any delay?

A. It depends on how much it was delayed. You take a sand pile and let it stand there six months, there would not be any sand there then.

Q. It could be removed all right?

A. It might have laid there, but not any six months.

Q. That is a fact. It was removed immediately after stopping work?

A. Yes, sir.

Q. You say they have their appliances here for doing paving work, they have other contracts amounting to over $300,000 in this city, the Conway Company, at this time beside these eighteen contracts?

A. They have their contracts; yes, sir.

Q. You are furnishing grade stakes for those?

A. Yes, sir.

Q. This entire force could be employed upon that improvement?

A. A great many of those streets are open.

Q. A great many are not open?

A. Some that are not.

(A) They receive something like $500,000 (work) of work other than involved here?

A. $400,000.

Q. That work has not been commenced?

A. Has not been started; no, sir.

Q. Then there was something over $200,000 in addition to that they received about the same time they begun work on these particular contracts, in fact before that?

A. Yes, sir; their contract—that is the first contract there is no question about, I think amounted to $225,000.

Q. This entire force which they have could be used on these streets that are not completed if this work was stopped, couldn't they?

A. No, sir.

Q. Could not be?

A. No, sir.

Q. Why?

A. You could not put them on there, would not be room to put them all on. In the first place, you have got to grade the street then you follow it up with sewers, then follow the concrete with your asphalt. Now, if they open up the new contracts, the first thing they would do would be to put on the grading—utilize the grading forces.

Q. Let me ask you this: if they were to cease work on these eighteen contracts they could change on to other work without any difficulty, except they would be required to discharge some of the men

in their employ, cut down some of the force, isn't that true?

A. They would have to reduce their force; yes, sir.

Q. But they could go right ahead and complete these contracts; that would be the only trouble?

A. I want to make that clear. Now, quite a large per cent of all the streets now in controversy, in fact 90 per cent of the streets now in controversy, are already completed or just ready for asphalt, so that the only forces that could work on the streets that are now in controversy would be simply the asphalt forces.

Q. You are not including in that the $40,000 contract awarded the other night?

A. No, sir.

Q. At the time these contracts were awarded to David McCormick by the City Council, he had all appliances and machinery here to go ahead and do this work, didn't he?

A. No, sir.

Q. Didn't he have an asphalt plant?

A. Yes, sir; he had an asphalt plant.

Q. He had other machinery here?

A. No, sir.

Q. Didn't he have shovels?

A. He might have had a few shovels or picks?

Q. And tools, picks, all that sort of things?

A. No, sir; I say he didn't have them here. He finished the Eighth street paving in October and he had to borrow some tools in order to finish that.

Q. At the time these contracts were awarded to David McCormick, isn't it a fact he had more machinery

and plants here to do that work than the Conway Company people had?

A. The Conway people didn't have any at that time.

Q. None at that time?

Q. Didn't have until after this whole matter was disposed of by the City Council?

A. No.

Q. Didn't have until after suit was filed in the District Court to enjoin them from doing that work?

A. It was some time about the first of December when they got their outfit here, that is all their appliances that go with the paving work.

Q. You remember the meeting of the City Council at which Mr. Burwell appeared and addressed the City Council, protesting against the reconsidering of the David McCormick award, do you not?

A. Yes, sir.

Q. He knew all about the claim of Mr. McCormick, he had a contract for the paving of these streets?

MR. PAUL: Objected to as incompetent, irrelevant, immaterial, asking for conclusion; the record is the best evidence.

THE COURT: Sustained.

Q. Isn't it a fact that McCarthy was present in the council chamber that evening and heard all these proceedings?

A. He was in the council room that evening; whether he was there at that particular time when you addressed the council I could not say for certain.

Q. He was there about the council chamber all evening?

A. Yes, sir.

Q. Would it have been possible for him to have been in and out of the council chamber that evening

and not have known this matter was being considered?

MR. PAUL: Objected to as incompetent, immaterial.

THE COURT: Overruled.

A. That is rather a hard question to answer. I was there very busy at the time; I could not tell who was in the council chamber.

Q. I asked the question if it would have been possible for him to be in and out of that council chamber that evening and not know this matter was being considered there?

A. I don't think there was any question but what he knew there was a controversy about this paving, and you addressed the council. I don't think there could be any question about that.

Q. I was claiming the award was to David McCormick?

A. Yes, sir.

Q. During that time and before the award made to David McCormick was reconsidered by the council, did you talk with Mr. McCarthy about it?

A. Yes, sir; I talked to everybody, talked to Mr. McCormick, Mr. Kind, Mr. McCarthy, Mr. Bell.

Q. Did you talk with Mr. McCarthy as to whether the award to McCormick constituted a contract for that work?

MR. PAUL: Objected to as incompetent, irrelevant, immaterial.

THE COURT: Overruled; exception noted by defendant.

A. I don't know that I did; I have no recollection of it.

Q. You say you were present in the council chamber when Mr. Burwell addressed the council; he appeared there on two different occasions, didn't he?

A. I believe he did.

Q. Did you hear Mr. Burwell state to the Mayor and the council, or the President of the council, as the case might be, whoever was in charge of the City Council—the City Council was in regular session at that time, was it not?

A. Yes, sir.

Q. Did you hear Mr. Burwell state to the Mayor and council on that occasion that he had there eighteen contracts for these particular improvements and demanded that they be executed by the Mayor on behalf of the city and the proper officers of the city, and if they were not in form, they would make them complete and file plans and specifications if they were awarded the contracts by the council?

Mr. Paul: We object to that as incompetent, irrelevant, immaterial; the record is the best evidence.

The Court: Overruled.

A. I don't remember; I think they did, though.

Q. I will ask you to refresh your memory and see if you don't remember that?

A. There was so much said and occupied so much time there, it is pretty hard to remember what was said. It seems to me I have a vague recollection you did mention about having the contracts ready to tender and asked that they be executed.

Q. Didn't Mr. Burwell on that occasion or on a subsequent occasion, state to the Mayor and council that Mr. McCormick would insist on these awards and would take such legal measures as would be necessary to protect his interests?

A. Yes, sir; I heard that.

Q. That occurred while the council was in regular session?

A. Yes, sir.

Redirect Examination by Mr. Paul.

Q. At the time these contracts were awarded, did Mr. McCormick have a plant here for the purpose of finishing up some work or was the plant idle?

A. It was idle.

Q. How long had it been idle?

A. I think from the middle of October.

Q. It was still idle?

A. Yes, sir.

Q. Do you know to whom the plant belongs?

A. Supposed to belong to the Parker-Washington Company.

MR. BURWELL: Objected to as incompetent, immaterial, conclusion of witness.

THE COURT: Sustained.

Q. Do you know of your own knowledge to whom that plant belongs?

A. No, sir.

Q. Do you know by whom it was used in the work on Eighth street?

A. By the Parker-Washington Paving Company.

Q. Know what if any signs or statements appear on that plant as to the ownership of it?

A. The name of Parker-Washington appears on the side of the plant.

Q. Mr. McCormick was president of the Parker-Washington Company?

A. Yes, sir.

Q. These bids were made by him in his individual name, were they not?

A. In the name of David McCormick; yes, sir.

Q. At the time that Judge Burwell appeared before the council, was it not after the council had reconsidered its action in awarding the contracts on a ten year basis and determined to award them to the lowest bidder on a five year basis?

A. That was the time; it was at that meeting.

Q. After you had reported that the Conway Company was the lowest on five year guaranty?

A. Well, the proceedings in the council were about as follows: After the council convened and by motion adopted the five year guaranty, then motion was made to award the contract to the lowest and best bidder on the five year guaranty; I was called upon then to give the figures and I read the streets in their regular order, and the question would be asked, as I read from————Second street from the west line of Western to the east line of Blackwelder; Conway, $22,276; McCormick, $23,080;; Barber, $24,140; I would announce that the Conway Company was the low bidder; then motion would be made to award the contract to Conway for the particular street; then vote would follow.

Q. After that was done, Judge Burwell, as I understand you, appeared there and tendered the contracts to the city and made the announcement he proposed to carry out the terms of the contract?

A. He appeared then, but whether he tendered the contracts prior to the reading or close after, I am not prepared to say.

Re-Cross Examination by Mr. Burwell.

Q. Isn't it a fact that Mr. Burwell appeared there before the council before those bids were read for reconsideration and protested against the council —reconsidering the award of David McCormick?

A. It was at that meeting.

Q. Did Mr. Burwell appear before the motion to reconsider the award was voted upon or afterwards?

A. I could not say.

Q. I will ask you to refresh your memory and see if you cannot recollect that Mr. Burwell addressed the council protesting against the reconsideration of that bid and that Mr. Harris urged its reconsideration before the awards were made to the Conway people?

A. Well, I don't remember; I think you did; I think it was prior to the actual awarding.

Q. Then after they reconsidered it and voted to reject the ten year bids, then it was that they adopted the five year bids and you read those streets and those were then awarded to the other persons?

A. I cannot recollect the exact procedure when the council convened.

Q. The record has already been introduced upon that?

A. Yes, sir; I would rather rely upon the record. I think it was at that meeting you addressed the council, but exactly at what point in the meeting you addressed them, I am not clear, yet I think it was prior to the awarding.

Q. Prior to the time of the reconsideration of this bid, Mr. Burwell stated to the council that David McCormick would pursue whatever legal remedies he had to enforce his rights?

A. It was at that meeting, but exactly what time you addressed them or made that statement to the council, I am not prepared to say.

Q. To refresh your memory, don't you remember that these proceedings were all had and then while you were reading the streets and the City Council were passing upon them, that Mr. Burwell, and the other persons who had addressed the council, retired from the council chamber and you finished the awarding these contracts, the second award, after they had left the council chamber?

A. That may be true; yes, sir.

Q. To refresh your memory—

A. I am testifying exactly what I believe—it was at that meeting, but as to what time of the state of the meeting, I am not prepared to say; I wasn't interested in any way.

Q. You say you did report at the former meetings that McCormick was the lowest bidder on all these eighteen awards?

MR. PAUL: We object to that, the record is the best evidence.

THE COURT: Overruled.

A. When the award was made on the ten year guaranty, I read off all just in the same manner in which I read these.

Q. And the awards were made upon that basis?

A. Whoever was low man on the ten year basis was read to the council and award was made in that manner.

Q. You say the Parker-Washington machinery is idle at the present time?

A. Yes, sir.

Q. The Parker-Washington Company was the low bidder on these $40,000 worth of work awarded a few days ago, wasn't it?

MR. PAUL: Objected to as incompetent, immaterial.

(Question withdrawn by counsel.)

Re-Direct Examination by Mr. Paul.

Q. Do you remember when this law suit was tried here in the District Court on the 3rd day of December?

A. Yes, sir.

Q. Have you seen Mr. McCormick from that day to this?

A. Yes, sir.

Q. Frequently or otherwise?

A. A couple of times, I think.

Q. Do you know of your own knowledge whether he knew the Conway Company was at work on these streets?

A. I don't see how he could help know it.

MR. BURWELL: Move to strike out the answer.

THE COURT: Overruled; exception noted by complainant.

Thereupon the witness was excused."

We likewise desire to call the attention of the Court to the specifications prepared by the engineer and adopted by the Mayor and City Council with reference to the execution of the contract, found at page 51 of the printed record, which reads as follows:

"All bids for work to be performed under this contract shall be accompanied by a certified check for 3 per cent of bid————dollars ($——), and in case of failure on the part of the successful bidder to enter into contract within twenty (20) days after notice of acceptance of such bid, said check to become the property of the City of Oklahoma City, as liquidated damages for failure to enter into such contract. Upon execution of said contract within said twenty (20) days, said check to be returned to the bidder furnishing it.

"The said first party will be required to furnish, at the time of entering into contract for the work herein described, an approved bond, to the said second party, in

the sum of 20 per cent of contract ($——), for the faithful performance of the work, as herein specified, and within the specified time."

The attention of the court is also directed to certain proceedings of the City Council, relative to the transaction involved in this case.

See printed record, page 79, for extracts from record of city council journal, No. 12.

"Moved by Mr. Byers, seconded by Mr. McWilliams, that the council reject all bids for asphalt paving based on five year guarantee. Motion carried by unanimous roll call vote.

"Moved by Mr. Byers, seconded by Mr. McWilliams, that all bids of J. F. Hill for paving of the different streets as per advertisement for bids, ending at 5 o'clock p. m., November 2, 1908, be rejected and not considered as samples of materials to be used submitted by him were not in accordance with the specifications of the City Engineer for this work. Motion carried by unanimous roll call vote.

"Moved by Mr. Helm, seconded by Mr. Land, that all bids for asphalt paving be rejected and the clerk instructed to re-advertise for bids for this work.

"Moved by Mr. McDavie, seconded by Mr. McWilliams, as a substitute for Mr. Helm's motion that the bids for asphalt paving be taken up street by street and contracts awarded to the lowest and best bidder.

"Substitution motion carried by roll call vote."

"Minutes of Meeting of City Council Nov. 5 (4), 1908, Awarding Contracts for Paving Certain Streets to David McCormick.

(See printed Record, page 79.)

"Oklahoma City, Okla., November 4, 1908.

"Council met in adjourned session at 2:30 p. m. with Mayor and following members present: Highley, Workman, Helm, Peshek, Johnston, McWilliams, McDavie. Land and Byers came in later.

"Moved by Mr. Workman, seconded by Mr. Helm, that council reconsider action taken at meeting held in forenoon of this date 'that the bids for asphalt paving be taken up street by street and contracts awarded to the lowest and best bidders.' Motion lost by the following roll call vote: Ayes: Workman, Helm. Nays: Highley, Peshek, Johnston, McWilliams, McDavie and Byers. City Engineer Burke reported that the bid of David McCormick was the lowest and best for the paving of Second street from the west line of Western avenue to the north line of Blackwelder Avenue, Oklahoma City, Okla.

"The bids were as follows:

"'DAVID McCORMICK.

Asphalt paving inc. 5" Portland C. Con. Found. 10y. Guar. per sq. yd.	2.10
Earth excavation per cu. yd.	.35
Concrete curb. and Gut. Str. 6" curb. per lin. ft.	.75
Concrete curb. and Gut. rad. 6" curb per lin. ft.	.75
Concrete double gutter, per lin. ft.	.75
3" oak header per lin. ft.	.15
Vit. pipe in place with backfill, per lin. ft. 10" 60c; 12" 80c; 18" 1.55; 21" 1.75; 15"	1.00
Manholes complete at	40.00
Catch basins at	20.00
Approx. total	$23558.25
R. F. Conway total	23574.00

"Moved by Mr. McWilliams, seconded by Mr. McDavie, that the bid of David McCormick being the lowest and best bid be accepted and he be awarded the contract for the paving of the above described street. Motion carried by the following roll call vote: Ayes: Messrs. Highley, Peshek, Johnston, McWilliams, and McDavie; Nays: Messrs. Workman, Helm and Land."

"Minutes of Meeting of City Council Nov. 9, 1908.

(See printed record, page 89.)

"Oklahoma City, Oklahoma, November 9, 1908.

"Moved by Mr. Highley, seconded by Mr. Helm, that the council reconsider the action taken at meeting held November 4, 1908, 'in rejecting all bids for asphalt pavement based on five year guarantee.' Motion carried by the following roll call vote: Ayes: Messrs. Highley, Workman, Helm, Corder, Peshek, Johnston and Land. Nays: McWilliams, McDavie and Byers. Moved by Mr. Highley, seconded by Mr. Corder, that the council reconsider the action taken at the meeting held November 4, 1908, in awarding contracts for all asphalt paving.

"Moved by Mr. Land, seconded by Mr. McWilliams, that the council adjourn to meet at 10 o'clock a. m., November 10, 1908, to give City Attorney Taylor an opportunity to investigate the law in regard to the legality of above motion of Mr. Highley. Motion carried.

"'EXHIBIT H.'

"Minutes of Meeting of City Council Nov. 10, 1908.

(See printed record, page 90.)

"We now offer in evidence extracts from council proceedings as found in council record No. 12 at page 250, under date of November 10, 1908:

"Oklahoma City, Okla., November 10, 1908.

"Council met in adjourned session at 11 o'clock a. m., with the Mayor and following members present: Messrs. Highley, Workman, Helm, Corder, Peshek, McWilliams, McDavie, Land and Byers.

"Moved by Mr. McDavie, seconded by Mr. Peshek, that the council adjourn to meet November 11, 1908, at 8 o'clock p. m., to give the City Attorney further time in which to investigate the law in regard to Mr. Highley's motion to reconsider the awarding of contracts for asphalt paving. Motion carried.

"'EXHIBIT I.'

"Minutes of Meeting of City Council Nov. 11, 1908.

(See printed record, page 90.)

"We now offer in evidence extract from council proceedings found in council record No. 12 at page 251, under date of November 11, 1908:

"Oklahoma City, Okla., November 11, 1908.

"Council met in adjourned session with the following members present: Messrs. Highley, Workman, Helm, Corder, Peshek, McWilliams, McDavie, Land, Byers, and Johnston; Mayor being absent, Mont F. Highley, President of the Council and Acting Mayor, presided.

"City Attorney Taylor gave verbal opinion in regard to motion of Mr. Highley made at meeting of council November 9, 1908, 'That the council reconsider action taken at meeting held November 4, 1908, in awarding contracts for asphalt paving.' His opinion was that any time before the contracts are signed up by the city and the contractor that the council had the right to rescind its action in awarding said contracts. Motion by Mr. McWilliams, seconded

by Mr. Helm, that the opinion of the City Attorney be received and placed on file. Motion carried. (There being no opinion of the City Attorney to place on file, the only record of such opinion is the statement as above written.—Clerk.)

"Judge Burwell appeared before the council and spoke against the motion and Judge Harris spoke in favor of the same.

"Motion as made by Mr. Highley, as stated above, carried by the following roll call vote: Ayes: Messrs. Highley, Workman, Helm, Corder, Johnston, Land. Nays: Messrs. Peshek, McWilliams, McDavie and Byers.

"I offer in evidence also extract from council proceedings found in Council Record No. 12, at page 269:

"Moved by Mr. McWilliams, seconded by Mr. Byers, that Judge Burwell be granted permission to address the council. Motion carried.

"Judge Burwell presented the eighten contracts of David McCormick for paving different streets and demanded that they be accepted by the council."

Testimony of Defendants.

Thereupon the defendants introduced the following testimony (See printed record, page 91):

"Mr. Paul: The defendants offer in evidence extract from the proceedings of the City Council of Oklahoma City, found in Council Journal No. 12, at page 251, commencing where Judge Burwell left off:

"'Moved by Mr. Byers, seconded by Mr. McWilliams, that the council do not consider any bids for asphalt paving to be let at this time based on the five year guaranty. Moved by Mr. Helm, seconded by Mr. Corder, as a sub-

stitute for Mr. Byers' motion that the council proceed to award contracts to the lowest and best bidder for asphalt paving based on the five year guaranty. Substitute motion carried by the following roll call vote: Ayes: Messrs. Highley, Workman, Helm, Corder, Peshek, Johnston, Land. Nays: Messrs. McWilliams, McDavie and Byers.

"'City Engineer Burke reported that the bid of R. F. Conway Co. was the lowest and best bid for the paving of Second street from W. line of Western Ave. to E. line of Blackwelder Ave., Oklahoma City, Okla. The bids were as follows:

Sh. Asphalt Pav. inc. 5" Portland C. Con. Found. 5 yr. Guar. per sq. yd.	$ 1.95
Earth excavation per cu. yd.	.35
Str. Concrete curb and gut. 6" curb per lin. ft.	.70
Red. Concrete curb and gut. 6" curb per lin. ft.	.75
3" Oak header per lin. ft.	.15
Vit. pipe in place with back fill per lin. ft. 10" 60c; 12" 80c; 18" 1.55; 21" 1.75; 15"..	1.00
Manholes complete, each	40.00
Catch basins at	20.00
Approx. total	$22,276.25
David McCormick total	23,080.50
Barber Asp. Co.	24,140.25

"'Moved by Mr. Corder, seconded by Mr. Byers, that the bid of R. F. Conway Co., being the lowest and best, that their bid be accepted and they be awarded the contract for paving the above described street. Motion carried by the following roll call vote: Ayes: Messrs. Highley, Workman, Helm, Corder, Peshek, Johnston, Land and Byers. Nays: Messrs. McWilliams and McDavie.

Mr. Burwell: We object to the introduction of that

because incompetent, irrelevant and immaterial and in no way affecting the contract with complainant.

THE COURT: Well, that is the question in the case; your objection can be noted and I will receive the evidence.

MR. BURWELL: Will your honor receive it subject to ruling upon it after investigation?

THE COURT: Certainly.

MR. PAUL: Without taking the time of the court to read all this, I will at this time state that the same record is made on each of the eighteen streets, paving contracts awarded to R. F. Conway, pages 251 and 265, inclusive. We offer these in evidence.

MR. PAUL: We also offer in evidence extract of council proceeding found in Council Journal No. 12, at page 270.

MR. BURWELL: We also wish to object to the introduction of this evidence on page 270 because it pertains to the purported contract for the same work to David McCormick.

THE COURT: Overruled.

Exception noted by complainant.

MR. PAUL (reading from page 270): "The contract and bond of the R. F. Conway Co. were read for the paving of Eleventh Street from west line of A., T. & S. F. Railway to east line of Robinson; Dale Avenue from north line of Park Place to south line of Thirteenth Street. Park Place from east line of Broadway to east line of Dale Avenue, Oklahoma City. Moved by Mr. Highley, seconded by Mr Land, that the contract and bond be approved and contract ordered executed. Motion carried by unanimous roll call vote, except Messrs. McWilliams, McDavie and Byers voting No.' "

PROPOSITIONS OF LAW.

Upon the part of the appellee the record herein discloses the following conclusions:

FIRST.

If appellant had such a contract as that he was entitled to relief, it was his duty, knowing that the city was simply charged with the burden of letting contracts for such improvements, and that it, in no event, was to become liable for the cost thereof, to have promptly proceeded to protect his rights by injunction or mandamus. He could not lie by for near unto three months, as was done in this case, and after the rights of others had intervened, then ask from the general taxpayer the profits which he might have made if he had been permitted to perform the contract.

SECOND.

Although the appellant may have been entitled to the contracts in controversy; and, though his bid were wrongfully rejected, he has no right of action against the city, at law nor in equity, to recover the profits which he might have made had his bid been accepted. He did not suffer any injury, directly, by reason of the act of the council,

though he may have lost the profits which he might have made. Such losses were not direct, but were speculative, consequential and problematical, and they were one of the risks which a bidder must assume in attempting to deal with a municipality, performing such character of governmental functions.

THIRD.

That, under the reserved right to reject any or all bids, and the rules of the council permitting a reconsideration, at the same or a subsequent meeting; and considering the events from the viewpoint that the Mayor and council were performing only governmental functions, and not ministerial duties, then at the time they exercised it, they were possessed of the power to reject any class of bids, or the appellant's bid in particular, if in their judgment and discretion they considered it best; and, appellant treated with the city possessing a knowledge of this power and cannot now complain of its exercise.

FOURTH.

In the letting of municipal contracts, the officers of a municipality perform not merely ministerial duties, but duties of a judicial and discretionary nature, and the courts

in the absence of fraud or a palpable abuse of the discretion vested in the officers have no power to control their action. In the case at bar, in the letting of the contracts which occasioned this controversy, the city was performing no proprietary functions, whatsoever, but was exercising a delegated governmental power, in the doing of which its officers were called upon to exercise judgment and discretion; and as no fraud is alleged, or shown, their action, in deciding which bid was the best bid to be accepted, was final, and was not the subject of review by any court.

FIFTH.

We insist that although there had been substantial agreement, the parties each recognized something remaining to be done to complete its execution; and that so long as this condition continued to exist, that there was not the meeting of minds necessary to constitute a completed contract. And, that under such a state of facts the Mayor and council in the exercise of their judgment and discretion still retained the right to reconsider and reject the appellant's bid; and, in so doing, they acted within their governmental powers, and their judgment of what was best to be done is not subject to review in the absence of a showing of fraud.

SIXTH.

The conduct of the appellant in having his attorney prepare formal written contracts, and the offering of them to the City Council for acceptance, and to be signed, contradicts appellant's contention that such formal contracts were not contemplated and the offer and acceptance not conditional upon the execution of final written contracts. Such action is conclusive that appellant knew that something more was contemplated by the parties than the bid and acceptance upon the minutes of the council; and when appellant prepared and signed the formal written contracts it was an admission that he did not regard the bid and acceptance as a completed contract; and if it was not such completed contract, then he is not entitled to maintain this action.

SEVENTH.

Where a city, on advertising for bids for a municipal improvement, both in the specifications and in the advertisement, reserved the right to reject any or all bids, and stated that the successful bidder must enter into a written contract to perform the work, and complainant knew from past experience, in executing similar contracts with said city, that he would be required to enter into a written contract,

according to an adopted form, in case his bid was accepted, and in his bid he provided that he would commence the work within a given time after signing the contract, a mere vote of the City Council to accept one of complainant's bids and to award a contract to him which was thereafter reconsidered, no written contract ever having been executed, was insufficient to show the execution of a contract for the work between the city and complainant pursuant to his bid.

ARGUMENT.

Appellant Guilty of Laches.

FIRST PROPOSITION.

If appellant had such a contract as that he was entitled to relief, it was his duty, knowing that the city was simply charged with the burden of letting contracts for such improvements, and that it in no event was to become liable for the cost thereof, to have promptly proceeded to protect his rights by injunction or mandamus. He could not lie by for near onto three months, as was done in this case, and after the rights of others had intervened, then ask from the general taxpayer the profits which he might have made if he had been permitted to perform the contract.

In the specifications under which appellant offered his bid (see printed record, page 44), appears the following language:

"The doing of the work embraced in the contract shall not render the city liable to pay directly or indirectly for said work or any part thereof, otherwise than by levy or special assessment, and issuance of certificates against the lots, tracts and parcels of land liable to be charged therefor, as provided by law, and that said contractor shall be without recourse or liability against the city of Oklahoma City in any event."

In Section 17 of his Bill of Complaint (see page 36 of the printed record), appellant quotes the above language of the specifications, and charges that it was the agreement, and the law, that in no event would the city become liable;

and in Section 19 of said Bill of Complaint, upon the same page of the record, appellant says:

"The expenses of paving the public streets of cities is taxed to the property owners in front of whose property the paving is laid and improvements made; that the city is not liable for the costs of such pavement. * * * "

Under such a state of facts appellant was fully aware, in contracting with the city officials, that in so doing they were acting wholly within their governmental functions, and that he must look solely for his compensation, if any accrued to him, to the proceeds of the special assessment as provided by the paving law.

He permitted the work to be proceeded with by another contractor, under a different kind of contract, to a point where injunction no longer availed him anything, and that contractor's right had accrued against the property owners by the actual performance of the work, and then he comes into this Court and asks that the general taxpayers of the city be forced to respond in damages to compensate him for his speculative profits.

Appellant surely slept upon whatever rights he may have had, and now has no just claim upon equity—to assist him in mulching speculative profits from the general taxpayer, who had no interest in the transaction, and whom the specifications provided, and the law said, in no event were to become liable.

The appellant cited numerous authorities upon the proposition that where, pending the consideration of a bill

in equity the party places it beyond the power of the court to do equity, the court will still retain the case and award damages nevertheless. We recognize the rule particularly in injunction cases and suits for specific performance of contracts, that where a court of equity once assumes jurisdiction and the guilty party places it beyond the power of the court to render a decree in equity, that the bill will not be dismissed, but the court will retain jurisdiction and award damages to the injured party. Appellant has not placed himself in position in this case, from all the evidence, as well as the law of the case, to invoke this doctrine and ask damages in this action as a result.

Necessarily the court below, upon its finding of fact that no contract existed between the parties, could do nothing else than render judgment against appellant and of necessity could not retain jurisdiction to award damages when there was no contract upon which damages could be given to the appellant, whether the city placed him in a position of being unable to carry out the work of improvement or not. Therefore, before the appellant could ask for damages in this case, he must show that a completed contract existed between the parties, and that such damages had accrued as would entitle appellant to a recovery. Has the appellant shown that he comes within the rule laid down by courts of equity, viz.: that he must come into court with clean hands and seek to do equity as well as demand it?

The contracts and bonds of the Conway Company were approved on the 16th day of November, 1908, and not until the 30th day of January, 1909, about two and one-half months after the contracts were awarded and approved, after the Conway Company had spent many thousand dollars in the performance of their contracts, some of the streets actually completed, others nearly so, and a vast number of employees at work, plants and machinery brought from a distance, and on the ground, operations under the contracts so awarded them in full blast, all with the positive knowledge of the appellant, who sat idly by and permitted this company to go about in the performance of its work and expenditure of its money, under contracts that were at least colorably valid, without a word of protest in this Court, and after December 4th, 1908, no effort made in the state court to prevent the inference by others in the performance of appellant's alleged contract, strikes us that the appellant does not come into this [illegible] of equity entitled to the relief which he is seeking.

We maintain that he is guilty of laches. Whether a party is guilty of laches depends upon the circumstances of each case. The appellant in this case is seeking relief in the nature of specific performance of the contract, or in lieu thereof, damages. Yet, he has permitted all this work to go on without protecting his rights. Is he guilty of laches? Upon that proposition we desire to cite the court to the following authorities:

26 Am. & Eng. Ency. of Law, 2 Ed., 77.

McCabe v. *Mathews*, 155 U. S. 550, 39 Law Ed. 256.

White v. *Wansey et al.*, 116 Fed. 345.

Dalzell v. *The Dueber Watch Case Mfg. Co.*, 149 U. S. 315.

Hennessey v. *Woolworth*, 128 U. S. 442.

Appellant Suffered no Injury—Damages Claimed are Speculative.

SECOND PROPOSITION.

Although the appellant may have been entitled to the contracts in controversy; and, though his bid were wrongfully rejected, he has no right of action against the city, at law nor in equity, to recover the profits which he might have made had his bid been accepted. He did not suffer any injury, directly, by reason of the act of the council, though he may have lost the profits which he might have made. Such losses were not direct, but were speculative, consequential and problematical, and they were one of the risks which a bidder must assume in attempting to deal with a municipality, performing such character of governmental functions.

Though a city charter requires contracts to be let to the lowest bidder, the lowest bidder under the contract proposed to be let by it, whose bid has been rejected, has no right of action at law against the city to recover the profits which might have been made had his bid been accepted. In such case the plaintiff did not suffer any injury directly by reason of the act of the council, though he

may have lost the profits which he might have made, yet such losses are not direct but consequential and it is no part of the object of the statute to prevent losses of that kind. Appellant should have proceeded by injunction or mandamus, and in such manner adjudicated his rights to a contract, if any he had. He could not lie by, and, after the work had been done, or partly done, ask for profits which he might have made if he had been permitted to perform the contract.

The case of *Strong* v. *Campbell*, 11 Barb. 135 (N. Y.) was one in which a postmaster was sued by the publisher of a newspaper for failure, under a certain statute, to accept his bid for publishing a list of uncalled for letters, and the publisher alleged that he was thereby deprived of the profits and advantage which would otherwise nave accrued to him from the printing of said list.

In the course of the opinion the court said:

"To give a right of action for such a cause, the plaintiff must show that the defendant owed a duty to him personally. Whenever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he had an interest in the performance of the duty, and that the duty was imposed for his benefit. But where the duty was created or imposed for the benefit of another, and the advantage to be derived to the party prosecuting, by its performance, is merely incidental and no part of the design of the statute, no right to created as forms the subject of an action. In this I apprehend all authorities will be found to agree."

Citing:

Martin v. *Mayor & C. of Brooklyn*, 1 Hill 545.
Bank of Rome v. *Mott*, 17 Wend. 556, 19 Vin. ab. 518, 520, 1 Salk 19.
Ashby v. *White*, 6 Mod. 51.

"In the latter case Holt, Chief Justice, laid down the rule that it must be shown that the party had a right *vested* in him, in order to maintain the action. And this I apprehend is the true rule. It must be an absolute vested right or interest in contradistinction to one incidental and contingent."

Further the court said:

"Now for whose benefit was the act of congress under consideration passed, and the instructions of the postmaster general given? Not surely that publishers of newspapers might be enabled to obtain profitable employment, and receive emoluments from the public treasury. That was no part of the design of the lawmakers. The design of the law obviously was, first, to benefit persons securing communications through the post office, by giving the widest possible notice that letters remained on hand ready for delivery; and secondly, to secure the greatest amount of revenue to the department by the delivery of letters and the receipt of postage thereon which might otherwise never be called for, and consequently be returned to the dead letter office. These plaintiffs had no direct interest in the observance of the law, and the regulations of the department, except as they received letters at this office. * * * But it is clear, I think, that these plaintiffs, as publishers of a newspaper, in which character they claim, had no such interest as gives a right of action. As connected with their paper they were not within the purview of the statute, except incidentally. * * * *They might make a profit by the performance of the duty, but they sustain no loss by non-performance.*"

In the case of *Palmer* v. *Inhabitants of Haverhill*, 98 Mass. 487, a case in which the selectmen of a village rejected a lowest bid for the building of a sewer, in passing upon the right of the bidder to damages, the court said:

> "The plaintiff's final claim is that the town is at least bound to repay him for the money expended and labor performed in making estimates. There is certainly no evidence of any express promise to do so. And we are aware of no principle of law by which such a promise is implied under circumstances like the present. An obligation to pay an unsuccessful bidder for his time and trouble in making proposals would be extraordinary. The inducement to make such bids is the hope that they will be accepted, and a profitable contract thereby obtained. If the town is bound to pay this plaintiff, so it would also have been to pay every one else who entered proposals, however many bidders there might have been."

It will be noted that in the case just cited the claim for damages was limited to the actual expense which the bidder had already been put to and this was denied, while in the case at bar the appellant is seeking to recover his imagined profits and must indulge the realms of speculation to measure them.

In the case of *Talbot Par. Co.* v. *City of Detroit*, 109 Mich. 657, 67 N. W. 979, 63 Amer. St. Rep. 604, it was held:

> "Though a city charter requires contracts to be let to the lowest bidder, the lowest bidder under a contract proposed to be let by it, whose bid has been rejected, has no right of action at law against the city to recover the profits which might have been made had his bid been accepted."

This was a case very similar in respect to demand

made for relief to the one at bar, being an action by the Talbot Paving Company against the City of Detroit to recover damages alleged to have been sustained by plaintiff by reason of the refusal of defendant's city council to let to it a contract for paving for which it was the lowest bidder. There was judgment entered on a verdict directed by the court in favor of defendant, and plaintiff brings error.

> "It was settled in the mandamus proceeding (*Talbot Pav. Co.* v. *Common Council of City of Detroit*, 91 Mich. 262, 51 N. W. 933) that the objection made by the respondent was purely technical and without foundation, and that justly, if not legally, the plaintiff may have been entitled to have its contract approved, as the respondent had made no change in the plans or specifications of the work and was proceeding to make a contract under its original resolution; but as the contract had been already let, and the work done, no relief could be granted by the writ of mandamus. The question was left open whether, under the circumstances shown, the relator had a right of action for its damages. The proposition here is whether the lowest bidder, under a contract proposed to be let by a municipal corporation whose bid had been rejected, has a right of action at law to recover profits which he might have made had his bid been accepted.
>
> "While it is true that there are many cases in which an injunction has been ordered because of the rejection of the lowest bid, and acceptance of a higher bid, under the same notice of letting the contract (*Times Pub. Co.* v. *City of Everett* [Wash.], 37 Pac. 695, and cases there cited), yet we find no cases, except as referred to hereafter, where a party has been permitted under such circumstances to bring and maintain an action at law for loss of profits. There are also cases which hold that the local assessment is void

if the contract is not awarded to the lowest bidder. *Twiss* v. *City of Port Huron*, 63 Mich. 528, 30 N. W. 177. While, under the charter of Detroit, it was the duty of the city to let the contract to the lowest responsible bidder, yet this charter provision was not passed for the benefit of the bidder, but as a protection to the public. We think the rule as stated in *Strong* v. *Campbell*, 11 Barb. 138, is the true one and the one which has always been adhered to by the courts. It is there stated as follows: 'Wherever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he had an interest in the performance of the duty, and that the duty was imposed for his benefit. But where the duty was created or imposed for the benefit of another, and the advantage to be derived to the party prosecuting by its performance is merely incidental, and no part of the design of the statute, no such right is created as forms the subject of an action.' The learned judge writing the opinion in that case cites, in support of this rule, the cases of *Bank* v. *Mott*, 17 Wend. 556; *Martin* v. *Mayor, etc.*, 1 Hill 545; 19 Vin. Abr. 518, 1 Salk 19; *Ashby* v. *White*, 6 Mod. 51. The court in *Strong* v. *Campbell*, *supra*, said: 'It is unquestionably the duty of every officer to perform every duty imposed upon him by law in the manner and to the extent prescribed, and he may be punished for every violation to the injury of the public or that of individuals. But it does not follow that some one has a right of action against him for every neglect or violation of duty to recover private damages.'

"Mr. Justice Selden, in the case of *Trustees of the Village of Plattsburg*, 16 N. Y. 161, note, filed an opinion written by him in the case of *Weet* v. *Trustees of the Village of Brockport*, which was adopted by the court as decisive of the Plattsburg case. The learned justice reviews at great length the various cases, both English and American, upon the subject. He says: 'We see from the two classes of cases that there is an important distinction between the obligations as-

sumed by private individuals for a consideration received from the government or sovereign power of the state and those assumed by public officers. * * * The reason for the distinction appears to be that intimated by Gould, J., in *Lane* v. *Cotton*, 1 Ld. Raym. 646, viz.: that the duties in the one case are imposed upon the officer for public purposes only, while in the other they are voluntarily assumed with a view to private advantage. The cases which have been cited show that, in respect to this distinction, corporations have been placed upon the same footing as private individuals.' Continuing, Mr. Justice Sebden says that he has been able to find only one case in this country or in England opposed to those views, and that is the case of *Adsit* v. *Brady*, 4 Hill 630.

"In view of this rule, what is the position of the City of Detroit towards the plaintiff? It owed no duty to the plaintiff. The charter provisions which required the acceptance of the lowest responsible bid had no reference to any interest which the bidders might have in the premises, but was passed to protect the interest of the citizens of the city. Though the act accepting the second bid may have been against the interest of the citizens, certainly the plaintiff could have no action to redress that wrong and injury. It may have been, and evidently was, under the facts shown, a neglect of duty, and the plaintiff undoubtedly was injured by it. The case of *Adsit* v. *Brady*, *supra*, was decided upon the theory that, when a public officer acts or omits to act contrary to his duty, the law gives redress to the injured party by an action adapted to the nature of his case. But, as we have seen, that rule is not sustained, except in cases where the act performed or omitted to be performed was with a view to some private advantage. But, it is contended, this rule would be a great burden upon the public, and lead to great frauds in municipal affairs. It may be said in answer to this proposition: First, that the public are not here complaining; and, second, that the plaintiff is not in a position to take advantage of the act, as the charter was not adopted for its individual

benefit. Again, it is apparent that, if frauds may be perpetrated in that way, there is a remedy by injunction to prevent the making of a contract with the next highest bidder. We are of the opinion that the plaintiff cannot sustain this action."

Equally strong does the argument of the learned judge in the Michigan case apply to the issues in the case at bar, and it seems to us to be upon all fours and conclusive in this action.

Council Performed Governmental Functions and Had the Power to Reject Bids.

THIRD PROPOSITION.

That, under the reserved right to reject any or all bids, and the rules of the council permitting a reconsideration at the same or a subsequent meeting; and, considering the events from the viewpoint that the Mayor and council were performing only governmental function and not ministerial duties, then at the time they exercised it they were possessed of the power to reject any class of bids, or the appellant's bid in particular, if in their judgment and discretion they considered it best; and, appellant treated with the city possessing a knowledge of this power and cannot now complain of its exercise.

Much has been said in appellant's brief about there being no essential difference between the contracts offered by appellant and the ones entered into by the city with the Conway Company. As most of the provisions of all

contracts of this class are, from long usage and custom, largely formal, this, in a way, appears to be correct.

However, in one most important essential there is a very great difference; a difference in fact which makes these two contracts entirely dissimilar.

Upon page 164 of the printed record (last paragraph), it will be observed that McCormick offered to agree to keep the improvements in good repair for the full period of ten (10) years from and after the acceptance of the same by the city; and, in the last paragraph of page 171, of said record, it will be seen that the contract with the Conway Company, which was accepted, reduced the period of maintenance to five (5) years.

A calculation of the difference in ultimate costs to the property owners shows that this change resulted in a very great reduction in cost, and this saving constitutes the essential difference between the two contracts, and was, in fact, the moving cause for rejecting the ten year bids, and with them the McCormick bids, and in accepting the less expensive five year bids resulting in the Conway Company receiving the contracts.

Why did the City Council call for two different kinds of bids, if it did not retain within itself the right to consider and accept or reject the class which appeared in their discretion to be for the best interest of the property owners? And, if such right was retained when was it to be no longer available?

Surely a governmental body, delegated for public purposes, with the judgment and discretion to think and act for the best interests of the property owners, who are forced to pay the bills, was not bound by a "spur-of-the-moment" vote to accept the ten year bids; and to be thus prevented, within the limits of a reasonable time, and within its rules, from thereafter ascertaining and adjudging that the five year bids were the most economical, and, therefore, proceeding to accept them as the best bids.

In doing this the Council did not specifically reject appellant's bid, but it did reconsider its previous motion to accept the ten year bids, and in so doing appellant's bid, for that class of contracts, was no longer available. Upon the Council concluding to adopt the class of bids calling for a five year guarantee, all the bids for such latter class of work were considered, and the bids of the Conway Company, upon their face, were seen and adjudged to be the lowest and best bids.

No contention is made that the bids of the Conway Company, upon the five year guarantee, were not the lower in cost and therefore they were properly adjudged to be the lowest and best bids.

Therefore, the real contention of the appellant in this case is not that his bids were rejected, because such rejection was simply an incident to the determination of the Council to accept five year guarantee, in lieu of its first decision, to accept those of a ten year duration—*but that* ***the City Council had no right to reconsider its action in***

deciding to accept the ten year bids. Such a decision upon the part of the Council was in its nature judicial, and was the clear exercise of the delegated discretion bestowed upon it by the state legislature.

One of the purposes of the legislature in delegating this discretion to the Council was that it was believed that the men occupying the positions of Councilmen were capable of passing upon just this sort of questions.

And one of the purposes of the Council by following a fixed custom and in provisions in its notices to bidders, and in its specifications, and in its contract form, calling for a written contract, was that this judicial power and discretion should be retained until a final, definite and formal contract should be concluded.

Appellant would not directly contend for a moment before the court that he had a right to make the improvements in controversy, under a five year guarantee, for the price bid for a ten year maintenance. But this indirectly is what he does contend for. He did not have the low bid under the class of bids which were finally accepted, and so his real complaint is, not that his bid was rejected, but that he was not given the contract under a class of bids where another had, beyond question, submitted the lowest bid.

Appellant in no place argues that in deciding to reject the ten year bids, and to accept the five year class, that the

Council did not act within its province, and such was what it did, and all it did, in this case.

The rules of the City Council provided that the Council may reconsider any action taken by it at either the same meeting or at the next succeeding meeting thereafter. The reconsideration in this case took place at the next meeting of the Council, all intermediate meetings having been adjournments taken from the regular meeting. This rule is authorized by the provisions of the Oklahoma Statute, found in Snyder's Compiled Laws, 1909, Sec. 664, which gives the Council the right to make all corporate rules to carry its corporal powers into effect. This proposition is generally recognized by the courts and we will not burden this court with authorities upon the proposition, contenting ourselves to cite to the court in support of that power, McQuillin's Municipal Ordinances, Sec. 115, and authorities cited in note 39.

Also:

Higgins v. *Curtis*, 39 Kan. 283; 18 Pac. 307.
Masters v. *McHolland*, 12 Kan. 17.

Each adjournment had from the 4th day of November to the next regular meeting at which the award was finally reconsidered, was but a continuance of the regular meeting and while counsel for appellant do not raise any issue upon this question we nevertheless desire to cite this court to the following authorities in support of that proposition:

McQillin's Municipal Ordinances, Sec. 112 and note 32.

Rutherford v. *Hamilton*, 11 S. W. 249.
Magneau v. *Freemont*, 9 L. R. A. 786.
Hubbard v. *Winsor*, 15 Mich. 146.
Carter v. *McFarland*, 75 Ia. 196.
State v. *Van Osdell*, 15 L. R. A. 832.
Sackett v. *State*, 74 Ind. 486.
Cut Camp v. *Utt*, 144 N. W. 214.

Reconsideration may be taken at any time prior to a final conclusion and acceptance and before any vested right has been incurred.

McQuillin's Municipal Ordinances, Sec. 121.

We take it that the argument found in the brief of the appellant in reference to the matter of reconsideration of the award, to the appellant, was void, is not supported by any authority submitted. We have called the attention of the court in this brief to the authorities cited and they do not, in any manner, support the proposition cited by the appellant.

We desire to call the attention of the court to the following authorities authorizing the Council to reconsider the action taken by it at any time before a vested right has accrued.

State v. *Foster*, 7 N. J. Law 101.
Jersey City v. *State*, 30 N. J. Law 521.
Dillon Municipal Corporations, 5 Ed. Sec. 539; and authority cited.
Platter v. *Board*, 2 N. E. 544.

We maintain that the appellant failed to show by any evidence that the acceptance of his bid was communicated

to him so as to bind either party as a contract. The appellant admits that no notice was ever given to him of the acceptance of his proposal, yet, in the brief and by the record he attempts to justify this contract by what he regards as a custom prevailing among bidders and contractors, that no notice of acceptance was ever given but that it was the duty of the contractor to ascertain whether or not the Council had awarded the contract to him, thereby recognizing, as he must, the proposition that before a contract is deemed to be executed in law based upon the foundation of proposals, it is necessary that notice of acceptance thereof should be conveyed to the proposer.

It is as unfounded and as contrary to the requirements of the law for appellant to say that he was in public meeting of the Council when this action was taken awarding to him contract, as that he read the same in the newspaper report of the Council proceedings the next day or the next week. Certain formalities of the law are required and the appellant is as much bound to observe the same whether he were present and heard the proceedings, or whether he gained knowledge through some other means.

The question is, was legal notice given of the acceptance of his proposal, so that before the same was given, might he have withdrawn his offer and thereby have escaped the execution of the contract that might have been injurious to him, as might the city, upon the reconsideration, determine not to enter into the contract previously awarded to

him. In other words, is there mutuality of contract by the proceedings had? Would the mere fact that if it had been the custom of this contractor, the appellant, and various other contractors, to act with the city in violation of the law, make lawful that which the law has declared in express terms as unlawful?

The law of contracts is well defined in the Statutes of Oklahoma, Sections 1059 to 1066, Snyder's Compiled Laws, 1909, read as follows:

"Sec. 1060. MUTUAL CONSENT DEFINED. Consent is not mutual unless the parties all agree upon the same thing in the same sense. But in certain cases, defined by the Article (111) on interpretation they are to be deemed so to agree without regard to the fact. (S. 1890, Sec. 818.)

"Sec. 1061. HOW COMMUNICATED. Consent can be communicated with effect, only by some act or omission of the party contracting, by which he intends to communicate it, or which necessarily tends to such communication. (S. 1890, Sec. 819.)

"Sec. 1062. SPECIAL MODE OF ACCEPTANCE. If a proposal prescribes any conditions concerning the communication of its acceptance, the proposer is not bound unless they are conformed to; but in other cases any reasonable and usual mode may be adopted. (S. 1890, Sec. 820.)

"Sec. 1063. TRANSMISSION OF CONSENT BEGUN. Consent is deemed to be fully communicated between the parties as soon as the party accepting a proposal has put his acceptance in the course of transmission to the proposer, in conformity to the last section. (S. 1890, Sec. 821.)

"Sec. 1046. ACTS WHICH ARE AN ACCEPTANCE. Performance of the conditions of a proposal, or the accept-

ance of the consideration offered with a proposal, is an acceptance of the proposal. (S. 1980, Sec. 822.)

"Sec. 1665. ACCEPTANCE MUST BE ABSOLUTE. An acceptance must be absolute and unqualified, or must include in itself an acceptance of that character, which the proposer can separate from the rest, and which will include the person accepting. A qualified acceptance is a new proposal. (S. 1890, Sec. 823.)

"Sec. 1666. REVOCATION OF PROPOSAL. A proposal may be revoked at any time before its acceptance is communicated to the proposer, but not afterwards. (S. 1890, Sec. 824.)"

In the case of *Dunham* v. *The City of Boston*, 12 Allen 375, the court says:

"The court are of opinion that the evidence does not prove that the defendants contracted with the plaintiff for the sale of the land to him. The vote passed on the 11th of August does not import a contract, even when approved by the Mayor. It was not communicated to the plaintiff as a contract, and it does not appear that it was intended to be so. On the contrary, it was to be communicated to the proper officers of the city as an authority to them to execute a deed, and it contemplates the deed as the only contract which the city was to make with the plaintiff. It was thus a mere preliminary to the completion of the contract."

See also:

Gennis v. *Mount Hope Iron Co.*, 53 Me. 20, 9 L. R. A. 117, 13 S. C. 94.

Beckwith v. *Cheever*, 21 N. H. 41.

Duncan v. *Heller*, 13 S. C. 94.

In the case of *Sears* v. *Kings County Elevated R. Co.*, 9 L. R. A. 117, it is held:

"To make a vote of a corporation a contract which

will be binding on it, the obligation which it undertakes to assume must be offered to, and accepted by, the intended beneficiary.

"In the action of an officer of a corporation to recover salary which is alleged to have been fixed by a vote of the Board of Directors, parol evidence is admissible to show that the vote was never communicated to or accepted by the plaintiff, and for this purpose proof of the circumstances attending the transaction may be given."

Letting of These Contracts Were Governmental Functions, Beyond the Control of the Courts, Except Upon a Showing of Fraud.

Fourth Proposition.

In the letting of municipal contracts the officers of a municipality perform not merely ministerial duties, but duties of a judicial and discretionary nature, and the courts in the absence of fraud or a palpable abuse of the discretion vested in the officers have no power to control their action. In the case at bar, in the letting of the contracts which occasioned this controversy, the city was performing no proprietary functions whatsoever, but was exercising a delegated governmental power, in the doing of which its officers were called upon to exercise judgment and discretion; and as no fraud is alleged, or shown, their action, in deciding which bid was the best bid to be accepted, was final, and was not the subject of review by any court.

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The Supreme Court of the Jurisdiction of Oklahoma, when the latter was a Territory, in an unanimous opinion, concurred in by the learned counsel for the appellant, when he was sitting as a member of that bench, has accepted and adopted the identical principles contended for by the appellees in this case, and applied them in the case of *Turner et al. v. City of Guthrie*, 13 Okla. 26, 73 Pac. 283.

In that case the Territorial Supreme Court cited with approval:

> *Board of Commissioners of Montgomery Co. v. Fullen et al.* (Ind. Sup.), 12 N. E. 298.
>
> *Little v. Board of County Commissioners of Hamilton Co.*, 7 Ind. App. 118, 34 N. E. 499.
>
> *German-American Savings Bank of Burlington, Iowa, v. City of Spokane* (Wash.), 49 Pac. 542, 38 L. R. A. 259.

In all of these cases the rule in substance is laid down firmly that construction of street improvements is in no sense a municipal matter; that the city council in so doing is not acting as the agent of the city, but of the property owners, by virtue of an express statute conferring that power upon them, and it is held that the municipality is not answerable for loss because of the errors, negligence or wrong-doing of the council.

In the body of the Oklahoma case the court said:

> "It cannot be said that the mayor and council were required by the Legislature to act as the agents of the City of Guthrie, according to the provisions of the act, and because the Legislature named the mayor and city council of the City of Guthrie as the instruments to carry out a portion of the provisions of the act, cannot make the City of Guthrie liable for a failure on the part of such officials to act."

will be binding on it, the obligation which it undertakes to assume must be offered to, and accepted by, the intended beneficiary.

"In the action of an officer of a corporation to recover salary which is alleged to have been fixed by a vote of the Board of Directors, parol evidence is admissible to show that the vote was never communicated to or accepted by the plaintiff, and for this purpose proof of the circumstances attending the transaction may be given."

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in the absence of fraud or a palpable abuse of the discretion vested in the officers, have no power to control their action.

Inge v. *Board of Public Works*, 135 Ala. 187, 33 So. 678, 93 Am. St. Rep. 20.
Stanley-Taylor Co. v. *San Francisco*, 135 Cal. 486, 67 Pac. 783.
Denver v. *Dumars*, 33 Colo. 94, 80 Pac. 114.
Keogh v. *Wilmington*, 4 Del. Ch. 491.
Downing v. *Ross*, 1 App. Cas. 251.
Kelly v. *Chicago*, 62 Ill. 279.
People v. *Kent*, 160 Ill. 655, 43 N. E. 760.
Louisville Steam Forge Co. v. *Gast*, 115 S. W. 761.
Kelley v. *Baltimore*, 53 Md. 134.
Madison v. *Harbor Board*, 76 Md. 395, 25 Atl. 337.
Detroit Free Press Co. v. *State Auditors*, 47 Mich. 135, 10 N. W. 171.
Detroit v. *Circuit Judge*, 79 Mich 384, 44 N. W. 622.
State v. *McGrath*, 91 Mo. 386, 3 S. W. 846.
State v. *Saline County*, 19 Neb. 258, 27 N. W. 122.
Scheibauer v. *Township Committee*, 57 N. J. L. 588, 33 Atl. 454.
Van Reipen v. *Jersey City*, 58 N. J. L. 262, 33 Atl. 740.
Murray v. *Bayonne*, 73 N. J. L. 313, 63 Atl. 81.
Terrell v. *Strong*, 14 Misc. 258, 35 N. Y. S. 1000.
Holley v. *New York*, 128 App. Div. 499, 112 N. Y. S. 797.
State v. *Shelby County*, 36 Ohio St. 326.
State v. *Hermann*, 63 Ohio St. 440, 59 N. E. 104.
Plessner v. *Pray*, 8 Ohio Dec. 149.
State v. *Columbus*, 9 Ohio Dec. 336.
State v. *St. Bernard*, 4 Ohio Cir. Dec. 224, 10 Ohio Cir. Ct. 74.

Hubbard v. *Sandusky*, 6 Ohio Cir. Ct. Dec. 786.
Wiggans v. *Philadelphia*, 2 Brews. 444.
Com. v. *Guardians of Poor*, 13 W. N. C. 61.
Com. v. *Mitchell*, 82 Pa. St. 349.
Findley v. *Pittsburg*, 82 Pa. St. 351.
Douglass v. *Com.*, 108 Pa. St. 559.
Carpenter v. *Yeadon*, 208 Pa. St. 396, 57 Atl. 837.
McCain, 9 S. D. 57, 68 N. W. 163.
Brown v. *Houston*, 48 S. W. 760.
State v. *Milligan*, 3 Wash. 144, 28 Pac. 369.

Where the awarding of a contract for a public improvement has been committed to a board of public works, in the absence of fraud or collusion its decision is final and conclusive, and cannot be controlled by the courts by mandamus or otherwise.

Maryland Pavement Co. v. *Mahool et al.*, 110 Md. 397.

In the body of this decision the court said:

"Yet the authorities are uniform in holding that in determining who is the lowest responsible bidder the municipal authorities have a wide discretion, which will not be controlled by the courts except for arbitrary exercise, collusion or fraud, and they need not be guided in their determination solely by the question of the pecuniary responsibility of a bidder, but may consider his ability to respond to the requirements of a contract and his general qualifications to properly execute the work."

Citing:

28th Cyc. 1031.
Keogh v. *Wilmington*, 4 Del. Ch. 491.
Madison v. *Harbor Board*, 76 Md. 395, 25 Atl. 337.

Further in its opinion the court said:

"The better doctrine, however, as to all cases of this nature and one which has the support of an almost uniform current of authority is that the duties of officers intrusted with the letting of contracts for public improvements to the lowest bidder are not duties of a strictly ministerial nature, but involve the exercise of such a degree of official discretion as to place them beyond the control of the courts by mandamus."

Citing:

Devin v. *Belt*, 70 Md. 354, 17 Atl. 375.
Baltimore, etc., v. *Latrobe*, 81 Md. 246, 31 Atl. 788.
Henkel v. *Millard*, 97 Md. 30, 54 Atl. 657.
Baltimore v. *Flack*, 104 Md. 143, 64 Atl. 702.
28th Cyc. 663.
20th Am. & Eng. Enc. of Law (2nd Ed.) 1169.

In *Scheffbauer* v. *Township Committee*, 57 N. J. L. 588, 31 Atl. 454, wherein the power of the courts was discussed at length, the court said:

"The objection of the prosecutors to the action of the township committee in the award of the contract is that it was not awarded to the lowest bidder. There can be no force in this objection. In the exercise of the power conferred upon them in this matter, they were not required to award the contract to the lowest bidder. The authority to enter into this contract was a general one, and not limited and restrained in any manner in this respect, and if they exercised the power in good faith,

in a bona fide manner, without abuse or corruption, then the court cannot interfere with the exercise of their judgment in the matter. They were not to exercise an arbitrary discretion, and over such an exercise of power the court would have ample control in order to defeat fraud or injustice, and to protect the public from the abuse of the power conferred, and from extortion and imposition. But if they exercised the power conferred upon a substantial and rational basis of fact, in good faith, in a bona fide manner, then the discretion or judgment, whichever the act may be called cannot be interferred with by the court. The legislative power to make this contract was conferred upon this body and not upon the court. They exercised the power, and whilst it may have been exercised in a different manner, or with a different discretion, from that which the court would have exercised, that alone furnishes no ground for nullifying their action. The power to be exercised, and the restraints of it, are matters of legislative jurisdiction. The abuse of the power, contrary to common justice, becomes cognizable in the courts for correction."

In *Keogh* v. *Wilmington*, 4 Del. Ch. 491, the court stated what it understood to be the precise limit of judicial interference with the discretionary powers of municipal corporations, in the following language:

"The courts may interpose so far as to protect private rights when violated or threatened by the action of these bodies, also to restrain them from the assumption of powers not granted by their charters, and further, to guard the public interests against any corrupt or fraudulent abuse of the powers granted to them. But where no private right is infringed and the city corporation or its officers are exercising their discretion in good faith, the court will not revise the grounds of their action is inexpedient for the public interest."

The New Orleans city charter requires that the furnishing of materials for public works shall be given to the lowest bidder, but there was a proviso that the council may reject any and all bids. *Held*, that the City Council was vested with a certain discretion in rejecting bids, which would not be controlled by the courts when exercised with prudence in the public interest.

> *Gauning Gravel & Paving Co. v. City of New Orleans*, 45 La. Ann. 911, 13 South 182.

Sustaining this rule is:

> *State ex rel. Irondale Chert Paving & Improvement Co. v. City of New Orleans*, 48 La. Ann. 643, 19 South. 690.

Until final action has been taken by a city council on proposals for street improvements, a contract for such improvements is incomplete, and may be defeated by the refusal of the body to proceed further.

> *South v. City of New York*, 10 N. Y. (6 Seld) 504. Affirming 6 N. Y. Super. Ct. (4 Sandf.) 221.

To same effect is:

> *Terrell v. Strong* (Sup), 14 Misc. Rep. 258, 35 N. Y. Supp. 1000.

Also:

> *Palmer v. Inhabitants of Haverhill*, 98 Mass. 478.

The discretion vested in the Commissioner of Public Works of Chicago to determine who are the lowest re-

sponsible bidders on contracts for public improvements cannot be controlled by the courts, in the absence of fraud.

People v. *Kent*, 160 Ill. 655, 43 N. E. 760.

See also:

General v. *City of Detroit*, 22 Mich 262.
Clopton v. *Taylor*, 49 Mo. App. 117.
Talbot Paving Co. v. *City of Detroit*, 109 Mich. 657, 67 N. W. 939, 63 Amer. St. Rep. 604.
Starkey v. *City of Minneapolis*, 19 Minn. 203 (Gil. 166).
Elliott v. *City of Minneapolis et al.*, 59 Minn. 111, 60 N. W. 1081.

In the case of *Mann* v. *Town of Rochester*, 63 N. E. 874, 29 Ind. App. 12, it was held that where the trustees of a town of under 5000 inhabitants advertised for bids for work in the construction of waterworks, and accepted a bid, such action constitutes no contract between the bidder and the town, but the making of a contract remains discretionary with the trustees until a written contract is executed by them.

In this last named case the bid was accepted without equivocation and caused to be entered of record the following: "Mann & Andrew of Dowagiac, Mich., was awarded the contract for laying the pipe, etc.," and in pursuance of said award the board directed its attorney to prepare a contract for said work and to forward the same to the contractors, which he did, and they received the contract, signed it and procured a bond conforming to the requirements and conditions of the letting of the work, which bond was executed

by the American Surety Co. of New York City, the same were mailed back to the appellees and received by them; and the appellants proceeded at great expense to prepare to carry out the provisions of the contract. In the body of the opinion the court said:

> "His right is not fixed by the ascertainment that he is the lowest bidder. Great latitude of discretion is given to the board of trustees, and, if in their opinion he cannot be depended upon to do the work with ability, promptness and fidelity, they may give the contract to next lowest bidder or decline to contract and readvertise. They are not limited in this regard until they have actually contracted. There was nothing in the published notice for bids to authorize an inference of a proposal to regard the announcement of the lowest bid and the award of the contract to the lowest bidder as final without the subsequent execution of a contract by the town."

In that case the court held that the use of the words in instructing their attorney "to prepare a contract for such work, and forward the same to" the appellants. And that it did not appear that the board executed the contract or dictated its provisions or had knowledge even of the contents of the instrument, and that in instructing the attorney to prepare "a contract" did not make the city a party to the contract.

And further the court said:

> "But until the agents of the public corporation have exhausted their official discretion confided to them by law in the interest of the portion of the public represented by them, the corporation is not irrevocably committed as a contracting party. In the matter of con-

struction of water works to be owned and managed by the city under the statutes above quoted, the municipality is under the protection of the discretionary authority of the official representatives, honestly exercised in its behalf, up to the final execution of the contract by them, and is entitled to receive through them the benefit of the exercise of their best judgment, based upon all information acquired by them, until their discretionary power is exhausted by the execution of the contract."

Further it said:

"It is the manifest meaning of the statute that the contract provided thereby shall be a contract in writing and it sufficiently appears to have been the purpose of the parties that the terms agreed upon by them should be reduced to writing, and should be signed by them before the contract would be considered as completely made; and where such is the case, especially where one of the parties be acting in a public capacity, all that goes before such completion must be regarded as negotiations for a contract or steps leading to a contract."

Citing:

Commissioners v. *Brown*, 32 N. J. Law 504.
People's R. Co. v. *Memphis R. Co.*, 10 Wall. 38, 19th Law Ed. 844.
Dunham v. *City of Boston*, 12 Allen 375.
Edge Moor Bridge Works v. *Bristol Co.*, 170 Mass. 528, 49 N. E. 918.

Did the Parties Enter Into an Enforceable Contract?

FIFTH PROPOSITION.

We insist that although there had been substantial agreement the parties each recognized something remaining to be done to complete its execution; and that so long as this condition continued to exist, that there was not the meeting

of minds necessary to constitute a completed contract. And, that under such a state of facts the Mayor and council in the exercise of their judgment and discretion still retained the right to reconsider and reject the appellant's bid; and, in so doing, they acted within their governmental powers, and their judgment of what was best to be done is not subject to review in the absence of a showing of fraud.

On this proposition we desire to call the attention of this Court to the case of *State ex rel. Cleveland Trinidad Paving Company* v. *Board of Public Service of Columbus*, 90 N. E. 389. This case was begun by the relator to compel the city of Columbus to enter into a contract for the paving of Third Avenue in the city of Columbus. On the 2nd day of October, 1906, the council passed an ordinance to proceed with the improvement and directed the Board of Public Service to advertise for bids and enter into a contract for the paving of this street.

The board did so advertise, which advertisement among other things provided that each bid should be accompanied by a certified check, conditioned that the contract should be entered into within five days after notification of acceptance from the board. The relator was the lowest bidder and on February 16th, 1907, the board adopted a resolution finding that the relator was the lowest and best bidder and ordered the contract be entered into for the improvement, upon the giving of a satisfactory bond within five days from that date, and the clerk was ordered to trans-

mit a copy of the resolution, but later the board by resolution set aside its previous action and readvertised for bids. The relator demanded execution of the contract and tendered the required bond and protested its willingness to perform the contract and tendered bond in the proper amount.

The court then says:

"A single question arises. It is: Can the municipal authorities, after determining to award a contract to one who has been, by resolution duly adopted, found to be the lowest and best bidder lawfully rescind such action and refuse to notify such bidder of its resolution and to enter into a contract with him, the bidder having in all respects complied with the requirements of the advertisement for bids and having shown that he is able, willing, and ready upon his part to enter into such contract?

"The question would seem to be answered by a consideration of Section 1536-679, Rev. St. (Section 143, Municipal Code), which, among other things, provides that the directors of public service may make any contract for any work under the supervision of that department not involving more than five hundred dollars, but that, when such expenditure will exceed that sum, the expenditure shall first be authorized and directed by ordinance of council. Then follow directions as to advertising for bids, specifications, of what the bid shall contain, for check or bond to accompany the same, for the opening of bids, that the board shall make a written contract with the lowest and best bidder, but that the board may reject any and all bids, and that, where there is reason to believe that there is collusion or combination among bidders, the bids of those concerned therein shall be rejected.

"The contention of plaintiff in error necessarily rests upon the claim, expressed in general terms in

the petition, that the duly authorized offer of the board tendered to bidders a proposition which when duly accepted by the relator, as it was by its bid and check, such bid being the lowest and relator being the best bidder, became a contract between the relator and the city; that vested right was thereby conferred upon relator, and it therefore became the plain mandatory duty of defendant to enter into the written contract provided for by the statute. There is apparent plausibility in this claim, but is it sound? It seems to us not. The weakness, fatal, as we think, lies in the assumption that the board had done all the statute requires in order to bind it; that its resolution implies an acceptance of the company's offer, and that there followed an acceptance by the company of the board's resolution and implied offer. Neither condition existed. The act of the board lacked one essential element contemplated by the statute, and required by the advertisement to be done by the board, viz.: Notification to relator of the passage of the resolution finding relator to be the lowest and best bidder. To fairly make the question which the counsel argue the element of notification should be present. At least until notification had been made it could not be claimed with reason that there had been any acceptance by the board of the company's proposition. In no just sense can it be said that the resolution was conclusive or binding on the board. It was in effect a mere mental assent on the part of the board unexpressed by any act which would conclude the negotiation or bind the party. Now was there any acceptance by the company, the attempt to do so having been made after the board had rescinded the only action taken which it is claimed formed the basis of a contract. So there was in fact no tender. One cannot accept that which has not been tendered, and cannot bind another by such attempted acceptance. Unless, therefore, the act of making the bid and putting in the check amounted to an acceptance, there clearly was no acceptance shown on the part of the company, and the bid and check cannot be treated as an acceptance, because all this was tentative and could have no potential effect

until the board had subsequently taken action in conformity with the statute. Necessarily, therefore, there could have been no contract. To accept a contract is to admit it and agree to it; to accede to it, to assent to it; the ordinary meaning embodies assent and agreement. 1 Am. & Eng. Ency. of Law & Prac. 224. And there can be no contract without such acceptance, for as Pothier says: 'A contract includes a concurrence of intention in two parties, one of whom promises something to the other, who on his part accepts such promise.' So it follows that as there was no mutual promise, no meeting of the minds upon the same terms at the same time, there could be no contract. Whatever might have been the legal right of relator to insist upon a written contract had such notice been given we need not in this connection discuss, for no such situation has arisen.

"But, aside from the foregoing a further view of the statute would seem to conclusively determine the rights of the parties. Running all through the legislation is a plainly implied if not expressed purpose to clothe the board of public service with the wide discretion in dealing with the making of contkracts for street improvements; the various precautionary provisions being intended to safeguard the public in its dealing with contractors. The board may reject any and all bids. If there be reason to believe there is collusion or combination among bidders, the bids of those concerned therein shall be rejected. True, the language is that the board shall make a written contract with the lowest and best bidder (that is, no contract shall be made with any but the lowest and best bidder), but the board is to determine who of all the bidders is the lowest and best, and no limit is placed respecting the time when the determination shall be made, nor is there any requirement refusing to the board the power, usually accorded to all municipal bodies, to rescind their action in a proper case. In the absence of such provision, the proposition is a far one that the usual rule prevails. That rule, well settled by numerous adjudica-

tions, is to the effect that the action of such bodies respecting legislative or administrative matters is not always conclusive and beyond recall, but that they are possessed of inherent power to reconsider their action in matters of that nature, and adopt if need be the opposite course in all cases where no vested right of others has intervened; the power to thus act being a continuing power. The powers involved in this inquiry are administrative powers, and necessarily they must involve the right to reconsider action theretofore taken, and, in the absence of a showing that fraudulent intent existed to the injury of the complaining party, courts will not interfere. In this case, under the statute cited, it is quite clear that the real substantial object to be attained is the making of the written contract. It is the only contract authorized by the statute, and all that precedes it but preliminary to the efficient object, viz., the written contract. Until that is executed the city is not bound. In the present case the board was authorized to bind the city by the written contract specified in the statute, but was wholly unauthorized to bind the city by any other contract.

"As conclusion, we regard the rule, entirely settled, as we think, that, where authority is given by statute to a board to let a contract to the lowest and best bidder, discretion is thus conferred, and courts will not undertake to control such discretion by mandamus applied to this case. *Exp. Black*, 1 Ohio St. 30; *State* v. *Commissioners*, 36 Ohio St. 326; *State* v. *Commissioners*, 63 Ohio St. 440, 59 N. E. 104. Among many authorities cited by the vigilant counsel for defendant in error special attention is directed to the following: *Coppin* v. *Herman*, 6 N. P. 452; *Ross* v. *Stackhouse*, 114 Ind. 200, 16 N. E. 501; *Red* v. *Augusta*, 25 Ga. 386; *Water Commissioners* v. *Brown*, 32 N. J. Law 504; *McClain* v. *McKisson*, 15 Cir. Ct. R. 517; *Braman* v. *Elyria*, 5 Cir. Ct. R. (N. S.) 387, affirmed in 73 Ohio St. 346, 78 N. E. 1119; *Yargan* v. *Toledo*, 8 Cir. Ct. R. (N. S.) 1; Page on Contracts, No. 43, 54; *Edge Moor Bridge Wks.* v. *Bristol*, 170 Mass. 528, 49 N. E. 918; *Benton* v. *Springfield Y. M. C. A.*, 170 Mass. 534, 49

N. E. 928, 64 Am. St. Rep. 320; *Dunham* v. *City of Boston*, 12 Allen (Mass.) 375; *People's Railroad* v. *Memphis Railroad*, 10 Wall. 38, 19 L. Ed. 884; *Stoddard* v. *Gilman*, 22 Vt. 568; *Cox* v. *Mount Tabor*, 41 Vt. 28; *Estey* v. *Starr*, 56 Vt. 690; *Capital Plg. Co.* v. *Hoey*, 124 N. C. 767, 33 S. E. 160.

"It may be added that persons dealing with municipal corporations must at their peril take notice of all grants of power and of all limitations of authority on the part of municipal agents, and that in the present case the relator must be held to have had notice of the scope of the powers of the board and the prescribed manner of their exercise.

"The judgment of the circuit court will be affirmed.

"Crew, C. J., and Summers, Davis, Shanck and Price, J. J., concur."

There can be no distinction between that case and the one at bar, in that the statute provided for a written contract, for in this case the resolution, which the statute authorizes, provides for the entering into a contract, agreeable to the specifications, which provide for the signing of the same, and which, as found by the trial court, was the intention of the parties.

In the case of *Mann et al.* v. *Incorporated Town of Rochester*, 29 Ind. Appeals 12, 63 N. E. 874, the appellant, pursuant to an advertisement for bids, submitted a proposal for the construction of certain municipal work, signed the contract and executed the bond required and stood ready and willing to perform all the terms of the contract as provided for in the specifications therefor. And in that case

the court holds that no contract was executed between the parties, as follows:

"The requirements of the act of 1879 relating to the making of contracts by the trustees of waterworks are therefore applicable to the board of trustees of the town, except the provisions relating to ratification of contracts of the trustees of the waterworks and the approval of bonds, the giving of which it was their duty to require. It is the purpose of the statute that a contract shall be received before the bidder shall acquire any right to perform the work. His right is not fixed by the ascertainment that he is the lowest bidder. Great latitude of discretion is given to the board of trustees, and, if in their opinion he cannot be depended upon to do the work with ability, promptness and fidelity, they may give the contract to next lowest bidder or decline to contract and readvertise. They are not limited in this regard until they have actually contracted. There was nothing in the published notice for bids to authorize an inference of a proposal to regard the announcement of the lowest bid and the award of the contract to the lowest bidder as final without the subsequent execution of a contract by the town.

"In connection with the entry of record of the awarding of the contract, as shown by the complaint, it appears that the board directed its attorney to prepare a contract for such work and forward the same to the appellant, which he did. It does not appear that the board executed this contract or dictated its provisions, or had knowledge even of the contents of the instrument. The attorney was directed to prepare 'a contract.' This, of course, did not make the appellee a party to the contract. On the contrary, considering the statute and the action of the board together, it is indicated that the board reserved its right to exercise its discretion to 'decline to contract.'

"In bidding for the work, and in signing the contract and offering the bond, the appellant were charged

with knowledge of the powers and duties of the officers of the municipal corporation under the law, and were bound to know that all the various acts of the board of trustees and all their own acts in the premises were but steps leading up to the necessary contract, and would be ineffectual for any purpose unless a contract were executed by the municipal corporation, through its official agents, pursuant to the statute. After the officers of the municipal corporation have fully exercised their discretionary official authority to make or not to make a contract in the interest of the corporation, and in pursuance of statutory directions have executed a contract in the interest of the corporation in its proprietary character, it is not to be supposed that the corporation can arbitrarily repudiate the engagement made for its advantage as a corporation. On the contrary, such a contract, fully made, will bind the municipal corporation, as like contract would bind a private corporation. But until the agents of the public corporation have exhausted their official discretion confided to them by law in the interest of the portion of the public represented by them, the corporation is not irrevocably committed as a contracting party. In the matter of the construction of waterworks to be owned and managed by the city or town under the statutes above quoted, the municipality is under the protection of the discretionary authority of the official representatives, honestly exercised in its behalf, up to the final execution of the contract by them, and is entitled to receive through them the benefit of the exercise of their best judgment, based upon all information acquired by them, until their discretionary power is exhausted by the execution of the contract.

"While the work here contemplated was to be undertaken in the interest of the community, the system of waterworks was to be the property of the corporation, and under its control and management as corporation property, and the corporation was to use it for its own benefit, and was to derive therefrom a special revenue. The making of a contract for construction

of such works was not the exercise of any of those continuing legislative or governmental powers which may not be ceded away so as to deprive the public corporation of future performance of its duties to the public on behalf of the state. On the contrary, such an engagement would constitute a contract, and therefore would not be revocable at the will of one of the parties thereto. The town was competent to contract, and, being so, it, like a private corporation, could not arbitrarily recede from its engagement. Yet the exercise of the authority reposed by law in those officials involved the imposition of a special tax upon the taxable property of the town. It also had relation, amongst other things, to the adequate protection of property within the town from fires, to the cleansing of market houses, the flushing of sewers, and other sanitary purposes. The language of the statute relating to the making of the contract is capable of being construed so as to still leave these matters, as results and purposes of their contemplated action, to the sound judgment of the municipal officials, exercised in good faith, until the contract shall have been executed by them.

"It is the manifest meaning of the statute that the contract provided for thereby shall be a contract in writing, and it sufficiently appears to have been the purpose of the parties that the terms agreed upon by them should be reduced in writing, and should be signed by them, before the contract would be considered as completely made; and where such is the case, especially if one of the parties be acting in a public capacity, all that goes before such completion must be regarded as negotiations for a contract or steps leading to a contract. When all was done, something remained to complete the contemplated contract. *Commissioners* v. *Brown*, 32 N. J. Law 504; *People's R. Co.* v. *Memphis R. Co.*, 10 Wall. 38, 19 L. Ed. 844; *Dunham* v. *City of Boston*, 12 Allen 375; *Edge Moor Bridge Works* v. *Bristol Co.*, 170 Mass. 528, 49 N. E. 918. Being of the opinion upon the foregoing considerations, that the complaint does not show a breach of contract or an action-

able violation of duty on the part of the appellee, we need not discuss the form of the complaint or the subject of damages. Judgment affirmed."

See also:

State v. *Noyes*, 25 Nev. 31, 56 Pac. 946.
Eads v. *Carondelet*, 42 Mo. 113.
Starkey v. *Minneapolis*, 19 Minn. 203 (166).
Mississippi and Dominion Steamship Co. v. *Swift*, 29 Atl. (Me.) 1063.
Hodges v. *Sublett*, 91 Ala. 588, 8 So. 800.
Congdon v. *Darcey*, 46 Vt. 478.
Hamilton v. *Cheapard*, 9 Wash. 352, 37 Pac. 472.
McKee v. *City of Greenburg*, 66 N. E. 1009, 160 Ind. 378.
Smart v. *City of Philadelphia*, 54 Atl. 1025, 205 Pa. 329.
Press Pub. Co. v. *Pittsburg*, 207 Pa. St. 623, 57 Atl. 75.

The attention of the court is particularly directed to the case of *People's Pass. Ry. Co.* v. *Memphis City R. Co.*, 10 Wall. (U. S.) 38, 19 Law Ed. 844, as the principles enunciated in that case seem to the appellees to govern completely the points involved in this proposition.

Appellant Knew and Acted Upon the Assumption That the Contract was Not a Completed One.

SIXTH PROPOSITION.

The conduct of the appellant in having his attorney prepare formal written contracts and the offering of them to the City Council for acceptance, and to be signed, contradicts appellant's contention that such formal contracts

were not contemplated and the offer and acceptance not conditional upon the execution of final written contracts. Such action is conclusive that appellant knew that something more was contemplated by the parties than the bid and acceptance upon the minutes of the council; and when appellant prepared and signed the formal written contracts it was an admission that he did not regard the bid and acceptance as a completed contract; and if it was not such a completed contract, then he is not entitled to maintain this action.

On page 671 of 28th Cyc. it is said:

> "Municipal contracts are, equally with other contracts, subject to the principle that, to constitute a contract, the minds of the parties must meet both as to the subject matter and as to the terms. Therefore a binding contract on which action will lie is not made where the price is not fixed, or where, although there has been substantial agreement, the parties recognize something remaining to complete its execution."

Citing:

Santa Rosa Lighting Co. v. *Woodward*, 119 Cal. 30, 50 Pac. 1025; *Fleming Mfg. Co.* v. *Franklin* (Iowa, 1905), 103 N. W. 997. Although a contract for advertising had been let by a city under Pa. Act, March 7, 1901, Art. 15 (Pamphl. Laws 36), as amended by the act of June 20, 1901 (Pamphl. Laws 592), and the award had been accepted and the contract reduced to writing, and accepted by the successful bidder, and delivered by him to the city, it was held that no contract existed where such contract was unsigned by the recorder, although his failure to sign was due to his

sudden death immediately after the delivery of the contract to him and before he could affix his signature. *Press Pub. Co.* v. *Pittsburg*, 207 Pa. St. 623, 57 Atl. 75. So, where bids for the building of a street railroad were invited by a city, and in response thereto an unincorporated company submitted proposals, and the city accepted them subject to a modification which the company agreed to, but no formal contract was signed, and a resolution was then passed by the city enabling the company to become incorporated, and declaring that the "proposals heretofore made and accepted" by the parties respectively should not thereby be changed, it was held that there was no perfected contract between the city and the unincorporated company. *People's Pass. R. Co.* v. *Memphis City R. Co.*, 10 Wall. (U. S.) 38, 19 L. Ed. 844.

In *Santa Rosa Lighting Co.* v. *Woodward*, 119 Calif. 30, 50 Pac. 1025, the Supreme Court of California, in holding that a contract for certain lighting was not yet complete, notwithstanding a vote of the council accepting the bid, and a formal contract drawn by the City Attorney had been signed by the complainant, said:

> "The contract bears strong evidence that something more was contemplated by the parties on July 3d than the offer and its acceptance as shown by the minutes, and that the company signed it indicates that it did not regard the offer and acceptance as a completed contract. * * * Respondents contend that there was nothing omitted in the offer and acceptance to make a completed contract; that the acceptance was not conditional upon the execution of a formal contract;

> that the formal contract could not contain any new condition; that the minds of the parties had met and agreed, and neither party had a right to insert other conditions or provisions. It seems to me that the conduct of the company in executing the formal contract with the new conditions (if they can be regarded as new) contradicts respondents' assumption that this formal contract was not contemplated. This assent is more than a tacit concession that the offer and acceptance were incomplete as a contract. It is the written admission that something more was to be done, and with the company's consent."

And this same circumstance constitutes in this case a further and conclusive proof of the knowledge and full acquiescence of appellant in the purpose of the city to retain in its mayor and councilmen the full power to control or reject any bid up until the final signing of the formal written contract is to be found in Section 9 of the contract which appellant's counsel tendered to the city to be signed. (See page 162 of printed record.)

In the section named the appellant used and offered the following condition:

> "9. This contract is entered into subject to the approval or rejection of the Council of the City of Oklahoma City, and *it shall not bind either party until so approved and confirmed* and is subject to all city ordinances now in force relating to such matters."

We do not quite understand what appellant's counsel meant by putting such a provision in this contract and then contending in this Court that a binding contract, covering this whole transaction, had previously been consummated in the vote of the City Council to accept the appellant's bid.

Did appellant's counsel regard the words "*it shall not bind either party until so approved and confirmed*" as being child's play, or a hollow mockery, or if on the contrary, did he not, by so doing, further confirm and acquiesce in the knowledge of the intent of the city to at all times until the final execution of the written contract, retain the right to exercise its best judgment and discretion in accepting or rejecting such contracts?

It appears to the appellees that, after using such a provision in the attempt to secure the signing of appellant's contract, that he is estopped from now asserting that he had such a contract as was beyond the right of the city to reconsider or reject.

Was a Legal, Binding Contract Entered Into?

SEVENTH PROPOSITION.

Where a city, on advertising for bids for a municipal improvement, both in the specifications and in the advertisement, reserved the right to reject any or all bids, and stated that the successful bidder must enter into a written contract to perform the work, and complainant knew from past experience, in executing similar contracts with said city, that he would be required to enter into a written contract according to an adopted form in case his bid was accepted, and in his bid he provided that he would commence the work within a given time after signing the contract, a mere vote of the city council to accept one of complainant's bids

and to award a contract to him which was thereafter reconsidered, no written contract ever having been executed, was sufficient to show the execution of a contract for the work between the city and complainant pursuant to his bid.

We take it that questions raised by the appellant other than the binding force and effect of the acts and proceedings of the Mayor and City Council need scarcely to be considered in view of the all-important question whether or not the record shows the execution of a contract.

Without setting forth in full the requirements of the statute for the construction of paving, the same having been set out in appellant's brief, the first step necessary to be taken in the absence of a petition therefor, is the passage of a resolution by the Mayor and council declaring the necessity for the construction of the improvement.

This resolution must be published in six issues of a daily newspaper and in the event the owners of more than one-half in area of the land liable to assessment to pay for the improvement shall not, within fifteen days after the last publication of the resolution, protest against the same, the Mayor and City Council shall have the right to proceed further in the construction of the improvement.

The next step taken by the Mayor and council is the adoption of a resolution properly reciting among other things that no protest had been filed and that the council would proceed with the improvement and define the character, extent and width of the same and character of ma-

terial to be used and such other matters as may be necessary to instruct the engineer in the performance of his duties in preparing for such improvement, the necessary plans, plats, profiles, specifications and estimates.

And the resolution shall further set forth any reasonable terms and conditions as the Mayor and council shall deem proper to impose with reference to the *letting of the contract and the provisions thereof*, and in addition to this the resolution shall provide for the execution of a good and sufficient bond for construction and may require, in the discretion of the council, a maintenance bond.

The clerk is then directed to advertise for bids and the Mayor and council shall *examine* all bids received at the time and place specified in the notice, and without unnecessary delay, award the contract to the lowest and best bidder who will perform the work and furnish the material which may be selected, and perform all conditions imposed as prescribed in the resolution and notice of proposals.

At the time and place fixed by the notice, the Mayor and council did examine all bids submitted, and decided to have the work constructed under the ten year guarantee, and they thereupon voted to award the contracts to the appellant, he being the lowest bidder under the ten year guarantee class of bids; but, at the next meeting of the council, that body decided to construct the work upon the five year guarantee plan, and with such purpose in view it reconsidered its previous decision to accept the ten year

plan, and carried a motion to accept the five year plan, in lieu thereof; and upon considering the bids, under the latter plan, it was decided by the council that the bid of the R. F. Conway Company was the lowest and best bid.

The action of the City Council in rescinding its previous decision to accept bids upon the ten year maintenance plan was done, as the record shows, before the execution of a formal written contract and before the tender, by the appellant, of either a construction or maintenance bond. The record discloses that the appellant has never tendered either a construction or a maintenance bond as provided by the resolution and notice to contractors and the statute. Under these circumstances, therefore, did the appellant and the city enter into a contract?

The position which appellees take in this case is, that the contract was not a completed contract, that the minds of the parties had not met, that the award, so called, was merely the official declaration that the appellant was the most satisfactory bidder, under the ten year maintenance plan, and that his bid would be the subject of a formal contract; that numerous requirements of the law had not been complied with at the time of the award; that the so-called acceptance was never communicated and the minds of the parties thereto did not meet so as to enter into a binding, legal, valid contract upon which rights and liabilities became vested.

In this case the city had by its specifications, advertise-

ment for bids and contracts, prepared for such cases, provided expressly for a written contract, and the appellant had actual knowledge of these requirements in making previous contracts, and assented to them in providing in his written bid that he would commence work within a certain time after the signing of the contract, and did prepare and offer formal written contracts to be signed.

Under such a state of facts the question here is not whether in the absence of these requirements there would have been a contract or the right to maintain an action of mandamus, but was the city bound the moment it voted to award the contract to McCormick, or was it necessary in the absence of a waiver to give him notice of the award and to prepare and sign a written contract?

The question is whether the appellant had such a contract as that an action for specific performance or injunction would lie in view of the fact that the specifications, advertisement for bids and contract prepared and regularly used by the city expressly contemplated a formal written contract, and that these facts were known and assented to by him.

Judge Dillon says:

> "After the opening of the bids, the ascertainment of the lowest or most favorable bidder, and the adoption of a resolution that the contract be awarded to him, does not make a completed contract between the municipality and the bidder when the charter requires that all contracts relating to city affairs shall be in writing,

or when the advertisement so specified." Dillon on Municipal Corporations, 5th Ed., 810.

And it is stated in the American and English Encyclopedia of Law:

> "Where the parties make the reduction of the agreement to writing and its signature by them a condition precedent to its completion, it will not be a contract until that is done, and this is true although all the terms of the contract have been agreed upon." 7 Am. & Eng. Enc. of Law, 2nd Ed., 140.
>
> "A vote accepting a bid is not a contract where a provision is distinctly made for the future execution of a formal contract." 20 Am. & Eng. Enc. of Law, 2nd Ed., 1170.

And in Cyc. it is said:

> "Where parties are merely negotiating as to the terms of an agreement to be entered into between them, there is no meeting of minds while such agreement is incomplete. Thus where they intend that their verbal negotiations shall be reduced to writing as the evidence of the terms of their agreement, there is nothing binding on them until the writing is executed."

Of course the distinction must be borne in mind between the enforcement of an executory and an executed contract.

If with the acquiescence of the defendant the plaintiff had gone on without a written contract and executed the contract they were negotiating upon and the city had received the benefits it is probable it could not have defeated him in an action to recover the bonds.

The rule undoubtedly is that if the parties have completed their negotiations and reached an entire basis of

agreement and one party with the knowledge and acquiescence of the other had gone on and performed the contract in whole or in part without the formal reduction of the contract to writing the other party will be held to have waived the execution of the written contract. And especially is this true where a property owner is resisting an assessment under such proceedings.

We shall therefore assume that where parties have fully agreed upon a contract but have simply decided to reduce it to writing as evidence the contract may be enforced, especially where it has been executed in whole or in part by the party seeking its enforcement with the knowledge and acquiescence of the other party, notwithstanding the failure to reduce it to writing. But if the parties have stipulated in effect that the contract shall only be in force from the time it is reduced to writing and executed there is no completed contract until it is put in writing as agreed.

In the case of *Carskaddon v. City of South Bend et al.*, 39 N. E. 667, the court says:

> "The following resolution was then adopted by the council: 'Resolved, That the Mayor of the City be instructed to purchase the property known in the proceedings of this council as the Carskaddon property, for the sum of $20,000.00. Said purchase to be made subject to the incumbrance thereon, $4,000, to be paid in cash and the balance of $5,000 to bear interest at 6 per cent for a time agreed upon by said Mayor and Carskaddon.' It was alleged generally that the proposition contained in the resolution was accepted by the

appellant, and that it was the intention of the mover of said resolution, and of the council in adopting it, that such action should complete the purchase of said property, and that the Mayor should act in receiving the deed and in executing the notes and mortgages. A tender of the deed to the Mayor and other steps by the appellant in compliance with the terms of the resolution were alleged. In one paragraph, reformation of the resolution was sought, by which the alleged intention of the appellee should be established, and thereupon to enforce specific performance.

"Elaborate and able briefs have been filed by counsel for the parties, and numerous questions have been fully presented, but we are of the opinion that the judgment of the circuit court must be affirmed upon two propositions: (1) The resolution upon its face does not create an obligation on the part of the appellee; and (2) it cannot be amended by parol. Upon the first of these propositions, it is perfectly plain that the resolutions and the proceedings preceding it do no more than express the preference of the common council for the appellant's property, and instructed the Mayor to purchase it. It is without doubt that, as a contract, the action taken included no obligation on the part of the appellant, and was wholly devoid of the elements of mutuality. The oral declaration of the appellant, in the meeting of the common council, that he would accept $20,000 for his property was not enforceable under the statute of frauds (Rev. St. 1894, Sec. 6629; Rev. St. 1881, Sec. 4904). Nor did his oral acceptance of the terms of the resolution create an enforceable obligation against him. First, for the reason that the resolution was not, upon its face, an obligation on the part of the city to make the purchase; and, second, because the oral acceptance was as much in violation of the requirements of said statute that such contracts should be in writing as was his oral offer of the property at the sum stated. The resolution but directs a purchase upon the terms stated, and by no possible construction can be held to constitute a

purchase. Nor can it be said that the resolution, together with the oral acceptance, constitute a contract to purchase. It is short of a contract, not only in that its terms create no obligation on the part of the appellee, but it is a familiar rule that where contracts are required to be in writing they must be wholly written. This rule is aptly illustrated in the case of *Board* v. *Shipley*, 77 Ind. 553, where a general order was entered by a board of county commissioners, allowing a bounty, in a sum stated, to each volunteer mustered into the service of the United States under a given call of the president, and which order was accepted, on the part of Shipley, by his enlistment and mustering into the service in accordance with the terms of the order. In a suit for the bounty, it was held that the contract, having been but partly written, and depending in part upon the parol evidence, should be regarded as an oral, and not as a written, contract, and that the six years and not the twenty years limitation applied.

"This rule has been recognized and applied in many other cases in this state. *Overshiner* v. *Jones*, 66 Ind. 452; *Pulse* v. *Miller*, 81 Ind. 190; *Weaver* v. *Shipley*, 127 Ind. 526, 27 N. E. 146; *Board of Commissioners* v. *Cincinnati Steam Heating Co.*, 128 Ind. 240, 27 N. E. 612; *Gordon* v. *Gordon*, 96 Ind. 134; *Board* v. *Miller*, 87 Ind. 257; *High* v. *Board*, 92 Ind. 580. In *Board* v. *Shipley*, *supra*, are cited a number of cases holding that resolutions much stronger than the present, in the creation of an obligation on the part of the resolving party, cannot be held to embody a contract."

In the case of *Water Commissioners of Jersey City* v. *Brown*, 32 N. J. Law 504, the court says:

"A contract does not become complete and binding until reduced to writing and signed, if it appears that such was the intention of the parties; and this rule is especially applicable to a case where one of the parties were public commissioners, and the law under which they

acted made it their duty to make their contracts in writing.

"Until the contract is complete either party may withdraw his consent, and end the negotiation."

And again at page 306 says:

"April twenty-ninth the commissioners adopted the following resolution: 'Resolved, That the Board accept the proposal of I. L. Brown for laying a submerged pipe across the Hackensack river, on the bottom thereof, for the sum of seventy-five thousand dollars, in accordance with the plan previously submitted to this board by said Brown; and that the engineer and attorney of the board be directed to prepare a contract for said work, and submit the same for approval by the board before being executed, said contract to contain a full and ample guarantee that said work will be securely and sufficiently done, and cover a test of at least five years.' A copy of this resolution was sent to the plaintiff, accompanied by a request from the engineer that he would call at the office, as he wished to confer with him in reference to the contract, and notes from the engineer were sent to him on the sixth, seventeenth, and twenty-seventh day of May, requesting to see him in reference to the matter. April twenty-seventh the contract was prepared (produced and marked A). It is in Bacot's handwriting; it was submitted to the board May nineteenth; it was then laid on the table, and no action had on it until the rescinding of the resolution. The minutes of the board, May nineteenth, contain the following entry: 'The superintendent also presented form of contract, specification, and bond with I. L. Brown, for laying thirty-six inch main pipes across the bottom of the Hackensack river; read and laid on the table.' Witness also proved paper B to be the form of agreement and specification. Between the twenty-ninth of April and the second of June, there was a change of commissioners. 'I was present when Mr. Brown came and offered to execute

the contract, some time after June second;' May twelfth he sent to the commissioners a letter, naming his securities, A. I. Fitch and C. G. Waterbury.

"The plaintiff testified: I attended on Mr. Bacot for the purpose of agreeing on a form of contract; we agreed; I agreed to submit to them; he wanted less movable joints; he said some of them objected to so many; in my first interview with Bacot, he wanted me to make out my views, and he handed me a printed form; I assented to giving security; they wanted a guarantee for five years; after I received resolution, I had a note with a copy of the resolution, I very soon came over; the next day or two Bacot told me he wanted contract made; he asked me to draw a contract as to what my ideas should be; after he had drawn up form of contract, I offered securities; I tendered myself on twenty-first June ready to make contract; my securities (Fitch was late), Waterbury, was with me; Wortendyke said he was not authorized to consummate contract; he did not object to securities; no disagreement between Mr. Bacot and me about manner of contract, as to specifications.

"Bacot, who was called by the plaintiff, testified: I had several interviews with Brown, after he rendered his proposals, about the form of the contract; there are two forms of contract, one in handwriting of Brown, received from him, and the other in my handwriting; mine is marked A, the other was blank form I gave to Brown; the blank form I gave him was to get his views as to time of finishing work, and to get his specifications for doing the work; form of contract was to be filled up by him; A was assented to by Brown; it was the contract agreed by Brown to be presented to the board; do not know whether securities had been then submitted to the board; think they had not; contract was prepared in April or May, before the rescinding of the resolution; the note from Brown, May twelfth (naming securities) was submitted to the board; there was no objection to Fitch, but they required time to inquire as to Waterbury.

"On the second day of June, 1862, the board adopted the following resolution: 'Resolved, That this board declines the bid of I. L. Brown to lay a pipe upon the bottom of the Hackensack river; and that the resolution passed by this board, April 29th, 1862, accepting said bid, be rescinded.'

"The plaintiff having rested his case upon the proofs thus detailed, the counsel for the defendants moved the court to non-suit him, upon the ground that the proposal of April twenty-fifth, and the resolution of April twenty-ninth, made no contract, as the acceptance by the resolution was not of the very proposal, which motion was overruled, and the cause submitted to the jury. Among other things, the judge charged that 'Brown had made a written proposal to the old board, which had been accepted by them by resolution. Its character had been changed before the second of June, from an open bid to an express contract. Has the plaintiff established, by proof, the material allegations in his declaration? There can be no doubt of that, if you believe the witnesses, and the genuineness of the papers which have been offered in evidence, and the correctness of the minutes of their proceedings.' To the refusal to non-suit, and to this part of the charge the defendants excepted: and these exceptions raise the question now to be determined by this court, viz., was there such an acceptance by the defendants of the plaintiff's proposal as made a contract between these parties, by which they were respectfully bound?

"The offer, on behalf of the plaintiff, was not to show a promise on the part of the defendants, which the law would imply from their acts, but to show an express contract by means of proposals to do certain work and furnish the materials, on the one side, and the acceptance of these proposals on the other. That to constitute a binding contract in such cases, the proposition of one party must be met by an acceptance of the other, which corresponds with it entirely and adequately; and that until the actual completion of the

bargain, either party is at liberty to withdraw his consent and put an end to the negotiation, is the well established law. 1 Pars. on Cont. 399-403.

"For the plaintiffs it was insisted that such an acceptance of Brown's proposals was made by the resolution adopted by the defendants on the twenty-ninth of April; and it is plain that, unless that was so, there was no act of the board, or of any authorized agent of theirs, which could have that effect. That resolution does purport to accept Brown's proposal, in accordance with the plan submitted by him; but it goes on to direct that their engineer and attorney prepare a contract for such work, and submit the same for approval to the board before being executed, and it must be taken altogether. It is plain, I think, from this express provision in the resolution, and from the testimony of Bacot and the plaintiff himself, that Brown's proposal was not accepted entirely and adequately; but that several particulars, as to the time of finishing the work, and as to the manner of doing it, and the guarantee that it would be securely and sufficiently done to cover a test of five years, remained to be settled. These matters appear to have been arranged, so far as the plaintiff was concerned, and to the satisfaction of Bacot, but Bacot was not authorized to bind the board, and did not profess to do so; on the contrary, the resolution expressly required that the contract, when adjusted to his satisfaction and the attorney's, should be submitted to them for their approval before being executed, the evident meaning of which is, that it was to be approved and executed before it was to be binding. Nor did the plaintiff execute, or offer to execute it, until after the board had dissented from it.

"This resolution required a written contract to be drawn and executed, as it was made the duty of the board, by the law under which they were acting, to do. Whether this provision of the law is so far imperative as to render all contracts not in writing inoperative and void, or whether it is to be considered as only directory to the commissioners, was much discussed on the argu-

ment; but it is not necessary for the decision of this case to determine this question. It is evident, however, that both parties were mindful of this provision of the law, and expected to comply with it.

"Even in a case between private individuals, where no writing is required, if it appears that the parties, although they have agreed on all the terms of their contract, mean to have them reduced to writing and signed, before the bargain shall be considered as complete, neither party will be bound until that is done, so long as the contract remains without any acts done under it on either side. *Wood* v. *Edwards*, 19 John R. 212. The propriety of this rule is still more apparent in a case where one of the parties is acting in a public capacity, and their acts are made binding upon a municipal corporation, and where the law expressly requires them to make no other than written contracts. After the written contract was submitted to the board, they passed no resolution approving it, and did no act in any way signifying their consent to its terms. In about twelve days after it was submitted to them, they expressly signified their dissent, by passing the resolution of the second of June, so severely censured by the plaintiff's counsel, by which they declined Mr. Brown's bid, and rescinded the resolution originally accepting it. If no contract had been so entered into at this time as to be binding, they had a perfect right to do this.

"It was urged for the plaintiff that the action was brought, not for refusing to enter into a written contract, as they had agreed to do. But this argument only begs the question in dispute. If no contract was so mutually agreed upon as to be binding on both parties, as seems to me to be too clear to admit of doubt, neither party was bound to execute the written agreement. Until both parties had assented to its provisions, there was only a negotiation for a bargain, which was never completed, and which neither party was bound to complete."

In the case of the *State ex rel. Schaw et al. v. Noyes et al.*, 56 Pac. 946, the court says:

"That on the 11th day of May, 1898, in pursuance of said election and in conformity with law, the city council published a notice to the effect that bids would be received until June 13, 1898, for the purchase of bonds, and also written proposals, with plans and specifications, to construct a water system for the city of Reno, to be paid for with the bonds of said city, which bids or proposals should be sealed, and addressed to the proper officer. That in answer to said notice the relators on or about the 13th day of June, 1898, submitted to the city council written proposals, with plans and specifications, to construct a water system for the city, to be paid for with the bonds of the city, in conformity with the notice. That at a meeting of the city council held on the 2nd day of July, 1898, the council passed a resolution accepting the bid of the relators to construct a water system for said city, subject to certain modifications, which resolution was in the words and figures following, to-wit: 'Resolved, That it is the sense and judgment of this city council that the bid of Messrs. Schaw, Ingram, Batcher & Co. to construct a water system for the city of Reno from bar B, on the Truckee river, composed of the material mentioned in said bid, and of converse patent lock joints, be accepted, and a contract entered into with the said bidder for such construction as soon as the city council is, in law, free and unrestrained so to do, subject to the following modifications: That * * * Messrs. Torryeson & Summerfield be, and they are hereby, directed, in connection with the committee of water, fire, and lights, to draft and submit to this council, at a special meeting to be held at 8 o'clock p. m., on Tuesday evening, July 5, 1898, a proposed contract embodying the terms of the foregoing resolution.' That at a meeting of said council held on the 7th day of July, 1898, the said council adopted the following resolution, to-wit: 'Resolved, That the proposed contract with

Schaw, Ingram, Batcher & Co., for the construction of a water system for the city of Reno, Nevada, * * * submitted to, and read in the presence of, this city council, be, and the same are hereby agreed upon, to be performed as soon as the city council is, in law, free so to do.' A copy of the approved contract was fully set out in the petition. By the terms of the agreement, in part, it is provided that the relators should be paid for their work in bonds of the city of Reno, bearing interest as follows: $25,000, or the nearest approximate amount thereto, at the time of the execution of the agreement; $25,000 at the time of the delivery of all of the material for the water system at Reno, Nev.; the residue in installments of different amounts at subsequent dates. The relators by the terms of the agreement, were required at the time of its execution, to make and deliver to the city council a good and *sufficient bond*, in the sum of $50,000, conditioned for the faithful performance of the obligations imposed upon them by agreement. The other stipulations of the agreement are not material to the determination of the questions to be decided in this action, and are therefore omitted. There is also an averment that relators at the time agreed to all the terms of the proposed contract, and are willing, and have ever since been willing, to enter into the same; that the relators thereafter demanded of the city council that it comply with and act in accordance with its proposals, and execute the contract and deliver to the relators the amount of bonds at the time and in the manner provided in said contract; that the said city council was at the time of the commencement of this action attempting to let to other persons the contract for the construction of said water system, in contravention of its acceptance of the bid of the relators; and that the said council was, at the time of the commencement of the action, in law, free and unrestrained to execute the contract. Upon the application, the alternative writ of mandamus issued out of the court, to which the respondents answered, in effect, that on the 25th day of June, 1898, the Reno

Water, Land & Light Company, a corporation, commenced an action in the Second judicial district court of Nevada against the respondents, as the city council of the city of Reno, to restrain and enjoin such council from entering into the alleged and proposed contract with the relators, and from proceeding further therein; that, upon the final hearing and trial of said action, judgment was rendered by said court favor of said corporation on the 4th day of August, 1898, by which judgment and decree the respondents were forever restrained and enjoined from entering into the proposed alleged contract with relators, and from proceeding further in the matter; that said judgment, order, and injunction have never been revoked or modified, and are now in full force, and binding upon the respondents; that an appeal has been regularly taken from said judgment, and the same is now pending and undetermined in the supreme court. It is further shown by the return and answer that the respondents denied that the relators ever gave them notice of their acceptance of the terms of the proposed contract, or of their desire to enter into the same, or of their acquiescence in, or acceptance of, the modification thereof, except that on the 12th day of October, 1898, and long after the rendition of the judgment set up, the relators caused a notice and demand to be served upon respondents, a copy of which was attached to the return. It is further shown by the answer and return that the city council of the city of Reno, at a meeting held on the 2d day of November, 1898, adopted a resolution to the effect that no further action should be taken by the city council in respect to the matter of receiving bids or proposals for the construction of waterworks for said city until the supreme court of the State of Nevada had decided the matter relating thereto then pending in said court. It is further alleged that the city council have at no time intended, nor do they now intend, nor are they endeavoring to contract with any person or persons for the construction of waterworks for said city, nor will they enter into any such contract, until the pending appeal aforesaid shall have been finally

determined. The relators interposed a demurrer to the answer, but we do not deem it necessary to consider separately the questions presented by the same, but such questions, as far as may be necessary, will be incidentally determined in the discussion of the case upon its merits. Under the issues made by the pleadings, it was shown by the testimony of Mr. Schaw, one of the relators, that he was present at the meeting of the city council held on July 7, 1898, at which the contract, as prepared by Messrs. Torreyson & Summerfield, under the direction of the resolution of the city council adopted on the 2d day of July, 1898, and as set out in the petition herein, was read, and that he, as the senior member of the firm of Schaw, Ingram, Batcher & Co., the relators herein, in response to a direct question from the president of the city council, accepted the terms of the proposed contract. The action of the Reno Water, Land & Light Company against the city council to restrain it from entering into a contract for the construction of a system of waterworks under the proceedings had by the council for that purpose, and under which the relators claim their rights, was instituted on the 25th day of June, 1898. That action was called for the hearing of the motion of the plaintiff for a temporary injunction on the 1st day of July, 1898, at which time, upon statement of counsel for the defendant to the effect that the city council did not intend to accept any of the bids, in the form in which said bids were presented, but that it would probably enter into a contract with some one of the bidders upon the basis of the modification thereof, it was stipulated that the further hearing of the action should be continued until further orders; that the city council, before entering into or executing any contract for the construction of a system of waterworks, should serve a copy of such proposed contract upon the plaintiff; that the plaintiff should, within five days after such service, institute such proceedings to restrain the execution thereof as it may be advised; and that after the commencement of said proceedings the city council would not take any steps which would change the rights of

the parties respecting such contract and the execution thereof until the decision of such action. The stipulation further provided that it should be entered as an order of court in the action. Thereafter, on the 13th day of July, 1898, the plaintiff in the action filed an amended complaint, by which it sought to restrain the city council from entering into the contract for the construction of the system of waterworks provided for by the terms of the contract under which relators claim. The answer of the city council was filed, trial had upon the issues, and the judgment rendered as set out in the answer and return of the respondents herein. The motion of the city council for a new trial was overruled, and an appeal taken therefrom, and from the judgment, to this court. It is also shown by stipulation that A. E. Cheney, the district judge who presided at the trial of that action and rendered the judgment therein, was an inhabitant of the city of Reno, and the owner of a large quantity of property therein subject to taxation.

"Whatever power or authority the city council of the city of Reno may have to enter into the contract set up in the petition will be found in the provisions of the act incorporating that city. St. 1897, p. 50.

"The meeting of July 2, 1898, was regular, and the city council, under the provisions of the act, was authorized to accept the bid of the relators, and to make a valid and binding contract respecting the matters shown. Was such contract made or was such action taken by the city council and the relators at that meeting, standing alone, as would bind the city council and the relators, or create any liability under which the relators could claim any right of action. We think not. The order of the city council set up in the petition, and admitted by the respondents, was not such an acceptance of relators' bid as would, independent of subsequent action, create any liability or any right of action whatever. The bid of relators was not unconditionally accepted by the city council. It was accepted subject to certain modifications specifically set out in

the order itself. No claim or showing is made, either by the pleadings or the evidence, that relators consented or agreed to, or were willing to be bound by, the modifications made; hence there was not, and could not be, any contract or liability under this order. On the contrary, it was shown by the evidence of Mr. Schaw, one of the relators, acting for all, that consent to the modifications suggested was not given by the relators until the matter was again considered by the city council and relators at the meeting of July 7, 1898. It is also shown that the city council did not intend to bind itself or the city by the order of July 2d, or give to the relators immediate and unconditional rights of any kind under their bid and the acceptance thereof, as the order expressly limits the time for entering into the contract with the relators for the construction of the system of waterworks to such time as the city council was free and unrestrained so to do. At the time this order was made an action was pending in a court of competent jurisdiction to restrain the city council from accepting the relators' bid, and, on the day immediately preceding the one on which the order was made, the city council had, upon a showing made in that action by it, to the effect that it would not accept the bid of the relators, except in a modified form, entered into a binding stipulation with the plaintiff in the action not to enter into or execute any contract on such bid, as modified or otherwise, until after it had served a copy of such proposed contract upon the plaintiff, that the plaintiff should have five days after such service to institute proceedings to restrain the execution of such contract, and that after the commencement of such proceedings in the matter which would change the status or the rights of the parties to the action respecting the contract and the execution thereof until the decision of the action. This stipulation was made in open court, and entered as an order thereof. It is therefore clear that the order of the council of July 2d is based upon this action, and the stipulation of the council made therein, and that it did not intend to

create any liability or rights under the order until such restraint was removed."

In the case of *Green* v. *Cole*, 15 S. W. 317, it is held that sufficient evidence to support a finding that the parties intended that the contract should be binding from the time the terms were agreed on.

See also *Hennessey* v. *Board*, 77 Fed. 403.

In the case of *Ambler* v. *Whipple*, 20 Wall. 546, 22 L. Ed. 403, it is held: "Where both parties intend to have a written instrument signed by each as the evidence of any contract that might be made, no contract is concluded until it is fully executed by both parties."

In the case of *Morrill* v. *The Tehama Consolidated Mill and Mining Co.*, 10 Nev. 125, the court says:

"It is essential to the existence of every contract that there should be a reciprocal assent to a definite proposition, and when the parties to a proposed contract have themselves fixed the manner in which their assent is to be manifested, an assent thereto in any other or different mode will not be presumed.

"Where parties enter into an agreement, and the understanding between them is that it is to be reduced to writing, or, if it is already in a written form, that it is to be signed before it is acted upon, or is to take effect, it is not binding upon them until it is so written or signed.

"In contracts where the promise of the one party is the consideration for the promise of the other, the promises must be concurrent and obligatory upon both at the same time.

"Where the agreement between the parties requires the execution of a bond, to be given by one of the

parties and signed by two sureties, conditioned for the faithful performance of the contract on his part; *Held*, that it was essential to the completion of the contract that the bond should be so executed.

"To render a proposed contract binding, there must be an accession to its terms by both parties. A mere voluntary compliance with its conditions by one who had not previously assented to it does not render the other liable on it."

In the case of *Eads* v. *The City of Carondelet*, 42 Mo. 113, was a case where a proposal was submitted by Eads to the city and an ordinance thereafter passed by the city directing the execution of the contract. The fact of the passage of the ordinance was communicated to the plaintiff and he partially performed the terms of his alleged contract, thereunder, but the court held that no valid contract was entered into between the parties if something remained to be done before the completion of the contract. The court in that case held as follows:

"The question here does not relate to the meaning or interpretation of the supposed contract, but is whether there was any contract made and entered into which was binding on the parties. There can be no valid contract unless the parties thereto assent, and they must assent to the sense. (1 Pars. on Cont. 475; 1 Sto. on Cont., Sec. 378; *Hazard* v. *New England Marine Ins. Co.*, 1 Sum. 218; *Green* v. *Bateman*, 2 Woodb. and M. 359; *Barlow* v. *Scott*, 24 N. Y. 40.) In *Honeyman* v. *Marryat*, 6 H. L. Cas. 112, a proposition to sell real estate was accepted, subject to the terms of a contract to be arranged between the parties, and it was held that there was no complete contract in the case. An absolute acceptance of a proposal, coupled with any qualification or condition, will not be regarded as

a complete contract, because there at no time exists the requisite mutual assent to the same thing in the same sense. And when a parol agreement is assented to, which it is understood between the parties is to be put into writing, it is not binding till it is put in that form. If we were at liberty to construe the first section of the ordinance alone, and wholly disregard the other parts, we should find no difficulty in finding the existence of a valid contract. But this we cannot do; the whole ordinance must be taken together to ascertain with what intent it was framed, and what was necessary to be done to carry it into execution and impart to it validity and force. After accepting the proposition of Eads in the first section, the second section proceeds to provide the means for carrying out that acceptance, not merely or exclusively on the terms proposed, but on such further conditions as may be deemed necessary. The mayor is authorized and empowered to enter into a written agreement with Eads, embracing the items of the proposition mentioned in the first section of the ordinance; and, to superadd further conditions which may be deemed necessary for the purpose of properly drafting the contemplated agreement, he is authorized to employ counsel. A written agreement is expressly provided for and contemplated, with such conditions as the mayor, acting for and in behalf of the city, might deem advisable. The ordinance was at once communicated to Eads, and he saw the terms and conditions annexed to the acceptance of his proposition. If he intended to hold the city, it was his duty to have the terms agreed upon and the contract closed by writing."

We invite the Court's attention to the case of *Starkey v. The City of Minneapolis*, 19 Minn. 203, a suit for damages because of the alleged refusal of the city of Minneapolis of permitting the plaintiff to perform certain work for the defendant city, and the question arose as to whether

or not a contract was in fact entered into: an advertisement was had inviting proposals for the work with the right to reject all bids. He being the lowest and best bidder it is alleged the contract was awarded to him and furthermore stated that he stood ready and willing to perform the work, but the court holds:

> "To award, is to adjudge, to give or assent by sentence or judicial determination. 'The contract' we can understand either of an agreement between two parties upon valid consideration to do or not to do a particular thing, or of a written instrument which embodies the agreement. The latter is not meant, but we are to understand that the defendant adjudged the agreement to do this work to the plaintiff, that is to say, it decided that it would agree with him to do it. Now, this is neither an acceptance of the plaintiff's offer to build the sewers in Minneapolis, nor a promise nor an offer made to him. It is a decision by the defendant that it will agree with plaintiff upon good consideration to do something which plaintiff has not yet offered to do, and defendant was as free the next moment to change that decision as it was to decide to build no sewer at all on Third street, or elsewhere. One might, it is true, use language incorrectly, and say that he 'awarded a contract' to one, meaning that he accepted an offer as made. In such a case his meaning would be a question for the jury. In the construction of pleadings, however, words are to be understood in their plain and ordinary sense, and so understood, if a pleading does not state a cause of action, the court must necessarily hold it insufficient.
>
> "In the present case, for instance, if it was meant by plaintiff and so understood by defendant, that he offered to build the Third street sewer at those prices by September 30th, and giving bond therefor to defendant's satisfaction in $10,000 and that the defendant accepted his offer as meant, why not say so?

"We must conclude on these pleadings that it was because the fact was otherwise. But the complaint proceeds to say 'to which award this plaintiff then and there duly assented and consented to the same.' That is to say the plaintiff 'assented and consented' to the defendant's decision to agree with him for the performance of this work.

"The question recurs: if there was a mutual agreement, the defendant to employ the plaintiff, and the plaintiff to do the work, why not say so? The last statement no more amounts to such an allegation than what preceded it. Such words *per se* import no obligation on the plaintiff's part to do the work. A mere assent does not suffice to constitute a contract."

In the case of *Mississippi & Dominion Steam Ship Co.* v. *Swift*, 29 Atl. 1063, the court lays down this rule:

"Upon the question whether the signing a written draft of the terms is essential to the completion of a contract, *held*: If the written draft is viewed by the parties merely as a convenient memorial or record of their previous contract, its absence does not affect the binding force of the contract. If, however, it is viewed as the consummation of the negotiations, there is no contract until the written draft is finally signed.

"The burden of proof is upon the party affirming the completion of the contract before the written draft is signed.

"In determining which view is entertained in any particular case, several circumstances may be helpful, as whether the contract is of that class which are usually found in writing; whether it is of such nature as to need a formal writing for its full expression; whether it has few or many details; whether the amount is large or small; whether it is a common or unusual contract; whether the negotiations themselves indicate that a written draft is contemplated as the final conclusion of the negotiations.

"If a written draft is proposed, suggested, or referred to during the negotiations, it is some evidence that the parties intended it to be the final closing of the contract."

In the case of *Hodges* v. *Sublett*, 91 Ala. 588, the court says:

"Where the parties orally agree upon the terms of the contract and there is a final assent thereto so that no variation can be introduced into the writing except by mutual consent, the mere suggestion or intention to put it in writing at a subsequent time is not of itself sufficient to show that they did not mean the parol contract to be complete and binding without being put in writing. Parties may, however, agree verbally upon the terms of a contract, and yet stipulate that it is not to be binding until put in writing; in such case such a stipulation becomes an operative term of contract, and unless reduced to writing and signed by the parties, does not constitute a complete and binding agreement."

In the case of *Fredericks* v. *Fasnacht*, 30 La. Ann. 117, it is said:

"The distinction is manifest between those cases in which there is a complete verbal contract which the law does not require to be in writing and a subsequent agreement that it should be reduced to writing, and those in which it is part of the bargain that the contract shall be reduced to writing. In the first class of cases the original verbal contract is in no manner impaired by the failure to carry out the agreement and put it into writing. In the second class of cases the final contract is suspended, the contract is inchoate, incomplete, and it cannot be enforced until it is signed by all the parties."

In the case of *Loman* v. *Robinson*, 14 Allen 242, the court says:

"The question always is, did the parties mean to

contract by their correspondence, or were they only settling the terms of an agreement into which they proposed to enter after all its particulars were adjusted, which was then to be formally drawn up, and by which alone they designed to be bound."

In the case of *Weitz* v. *Des Moines*, 44 N. W. 696, it is held that if a bid for work is accepted with the understanding that the contract shall be reduced to writing there is no contract which will support an action for the price of the building if the writing is not executed.

In the case of *Congdon* v. *Darcy*, 45 Vt. 478, it is held that if by agreement of the parties their negotiations are to be reduced to writing there will be no perfect contract so long as the act of reducing it to writing and signing it remains to be done.

See also the case of *Maddon* v. *The City of Boston*, 58 N. E. 1024.

We desire also to call the attention of this Court to the case of *West Chicago Board of Commissioners* v. *Carmody*, 139 Ill. App. 635, a case very similar to the case at bar. The Illinois court says: "Manifestly he was not entitled to receive a formal contract executed by the defendant until he should furnish such bond." In this case, we maintain that the giving and approval of the construction and maintenance bonds are conditions precedent to the execution of any contract. The council has no discretion in the matter, but the statute absolutely requires that the contractor shall give a satisfactory construction bond and the

council may require the maintenance bond which it did in this case. The bonds required are conditioned for the faithful performance of the contract. How, then, can appellant be heard to say that he has a completed contract when the condition upon which he may receive a contract may never be fulfilled? And though neither of these bonds may be given, yet how can a simple award constitute a binding contract between the parties?

Reference is made to the contract tendered by the appellant found in the printed record, page 164, as follows:

> "It is further agreed that the contractor shall at the time of the approval of this contract by the Mayor and council of the city furnish a construction bond in the amount of twenty (20) per cent of the total amount of the contract price for the faithful completion of the work in strict conformity to the plans and specifications of the said city engineer, a copy of said bond is hereto attached; and that upon the approval of said bond by the Mayor and council this contract shall become effective."

How, then, in the face of the very contract which is tendered as part of the pleadings of the appellant can he claim that the contract was in full force and effect when by the terms of the very agreement submitted by him, the approval of the bond completes the contract and makes it effective? In his pleadings, he recognizes the fact that all steps taken prior to the approval of the bond are merely negotiations leading up to the final act and the making effective and enforceable the mutual agreements of the parties. No other argument need be advanced to this Court than

this clause of the tendered proposed contract showing that the parties themselves recognized that until the last act was taken, neither party should be bound by previous negotiations.

In the case of *Kalamazoo Novelty Manufacturing Works* v. *McCakuster*, 40 Mich. 85, the plaintiff was employed as superintendent by resolution of the board of directors and the court holds that the passage of this resolution before legal acceptance did not constitute a contract.

See also *Peck* v. *Detroit Novelty Works*, 29 Mich. 313.

See also *Platter* v. *Board of Commissioners*, 2 N. E. 544.

In the case of *Edge Moor Bridge Works* v. *Inhabitants of Bristol County*, 49 N. E. 918, the court says:

"This was an action of contract, in which the plaintiff, in its declaration, alleged that defendants, by the county commissioners, had advertised for proposals for the building of a bridge; that plaintiff submitted a proposal, and complied with all the conditions of the advertisement and that afterwards the commissioners voted to accept plaintiff's bid, subject to certain conditions, involving an acceptance by plaintiff of the condition that the contract should depend on certian legislative action; that plaintiff agreed to such conditions, but the commissioners refused to award plaintiff the contract.

"ALLEN, J. The ground of action relied on by the plaintiff corporation is not that the county commissioners actually entered into a contract with it, under which it was to do the work, but that they agreed to enter into such a contract, and afterwards refused to do so. To support this view, the plaintiff relies on the vote of the county commissioners accepting its bid and

awarding the contract. We have therefore to consider whether, in view of the circumstances, the vote bears that construction. The vote is to be construed with reference to the advertisements under which the proposals of the plaintiff were submitted. The contract mentioned in the vote is the same contract mentioned in the advertisements, namely, the contract which was to be executed within six days from the date of notification of the award, and of the preparation and readiness for signature of the contract. A formal written contract, according to the form submitted to the bidders, was expressly provided for. After the award, the parties were to meet and execute such a contract. Where proposals and an award made thereon look to the future execution of the contract, such an award is not necessarily a contract of any kind, nor an agreement to enter into a contract based upon the proposals; it is, at most, a matter to be determined whether such an agreement exists, upon a consideration of the terms and purpose of the award, construed in the light of the existing circumstances. In *Lagman* v. *Robinson*, 14 Allen 242, where it was sought to establish a contract from letters, it was said: 'A valid contract may doubtless be made by correspondence, but care should always be taken not to construe as an agreement letters which the parties intended only as preliminary negotiation. The question in such cases always is: Did they mean to contract by their correspondence, or were they only settling the terms of an agreement into which they proposed to enter after all its particulars were adjusted, which was then to be formally drawn up, and by which alone they designed to be bound?' See also, *Ridgeway* v. *Wharton*, 6 H. L. Cas. 238, and cases there cited; *Winn* v. *Ball*, 7 Ch. Div. 29; *Rossiter* v. *Miller*, 3 App Cas. 1124; *Starkey* v. *City of Minneapolis*, 203 (Gil. 166); *Eads* v. *City of Carondelet*, 42 Mo. 113; Pol. Cont. 41. Especially where the supposed contract is found only in a vote passed by the board of public officers, which looks to the preparation and execution of a formal contract in the future, care must be taken not to hold that to be a contract which was

intended only to signify an intention to enter into a contract. See *Dunham* v. *City of Boston*, 12 Allen 375; *Commissioners* v. *Brown*, 32 N. J. Law 504, 510.

"In the present case, the county commissioners had advertised for proposals for doing a public work, with careful provision looking to the final execution of a formal contract between themselves and the bidder whose proposals should be accepted. The bidders were to be bound to stand by their proposals under a certain penalty or forfeiture. But the county was not bound until subsequently it should agree to be bound. The plaintiff concedes that no contract was made under which the work was to be done, but insists that the county commissioners did agree that they would thereafter enter into such a contract. We are unable to put that construction upon the vote. While it is possible for a party to agree in express terms to enter into an executory contract in the future (*Drummond* v. *Crane*, 159 Mass. 577, 35 N. E. 90; *Pratt* v. *Railroad Co.*, 21 N. Y. 305), the present case is not one of that description.

"The vote was but a step in the negotiations. It showed an expectation and an intention, for the time being, to enter into a contract with the plaintiff, upon the basis of its proposals. But the execution of the contract was an act to be done in the future, and, till that should be done, no intention to be legally bound is fairly to be inferred. The vote meant merely to say that the plaintiff's proposals were accepted, subject to the preparation and execution of a formal contract. There is nothing to indicate an intention to bind the county by a preliminary agreement that a formal contract should be executed in the future. This is especially apparent when the state of existing legislation concerning the powers and duties of county commissioners is considered. By St. 1897, 137 Sec. 22, it was provided that all contracts made by county commissioners for the construction of public works, if exceeding $800 in amount, shall be made in writing and

recorded in a book to be kept for the purpose with the records of the county; and that no contract made in violation of the provisions of this section shall be valid against the county and no payment thereon shall be made from the county treasury. By St. 1897, c. 153, a greatly increased strictness was established in respect to expenditures by counties, and the duties of county commissioners in respect thereto were defined, and their powers limited. In these statutes the purpose of the legislature to prevent wasteful or unnecessary county expenses is clearly manifested, and it is open to doubt whether it would now be in the power of county commissioners to bind a county by a preliminary agreement to enter into a future contract for the construction of a public work. This question, however, need not now be determined, because it is quite obvious that the county commissioners of Bristol county were seeking to conform carefully to the spirit of the provisions of the statutes and that by their vote they did not intend to bind the county by a preliminary agreement, such as that upon which the plaintiff relies. Judgment for defendants affirmed."

See also 7 Am. & Eng. Ency. of Law, 2d Ed., 140; 9 Cyc. 280; 28 Cyc. 662.

In the case of *Anderson* v. *Board, etc.*, 26 L. R. A. 707, the court lays down the following rules with reference to proposals and awards:

"It is claimed by defendant, in support of the demurrer and of the judgment in the trial court, that, as the plaintiffs' bid for the erection of the high school building related to public work, no action can be maintained for the refusal to allow plaintiffs to execute such work. The contention is that bids for public work are not governed by the general principles of the law of contracts. We do not consider it necessary to examine into the soundness of that contention, as we think the ruling the trial judge was obviously correct, even con-

ceding to plaintiffs that the transaction should be treated as an ordinary one between individuals, irrespective of the supposed public nature of its subject matter. That binding obligations can originate in advertisements addressed to the general public may be assumed as settled law today. But the effect to be given to such an advertisement as the basis of a contract depends entirely on the intent manifested by its terms. A public proposal of that nature may be so expressed as to need but an acceptance, or the performance of some act by a person otherwise undesignated, to constitute an enforceable legal agreement; while, on the other hand, the proposal may amount to nothing more than a suggestion to induce offers of a contract by others. The latter sort of proposal has some resemblance to (though imposing a still lighter obligation than) the class of promises described by Pothier as those in which the intent is exhibited (either by the words employed or by the circumstances or in some other manner) not to give to the person to whom they are made the right of demanding their performance. Pothier, Obligations (Evans' Ed.), pt. 1, p. 3. Proposals of contract by advertisement have a place in the modern common law of England and of this country, though they have not been so definitely classified in our jurisprudence as in that of some continental nations. Mr. Pollock, in his valuable treatise on the Principles of Contract, remarks on this point: 'We have no special term of art for a proposal thus made by way of general request or invitation to all men to whose knowledge it comes.' (4th Ed.)

"Still less have we any scientific nomenclature for that subdivision of the class of public proposals with which we have now to deal, namely, that class in which is disclosed the intent to invite mere offers of a contract, as distinguished from an intent to propose a contract for a direct acceptance by whom it may concern. But the principles to be applied by our law to such proposals are not, on that account, uncertain or obscure. When the intent expressed in the advertised

proposal is reduced to certainty by interpretation, our system of administration of law is fully capable of giving effect to that intent.

"In the case in hand the advertisement has the following caption: 'Proposals for the erection of the new high school building on Grand Avenue.' But the opening lines of the official statement, which follows, show that the caption refers to the proposals to be received, and is not intended to describe the effect of the advertisement as a whole. If there was otherwise any doubt on this point, it is set at rest by the last sentence, viz.: The board reserves the right to reject any or all bids. That language demonstrates the nature of the advertisement as a mere invitation for offers for a contract. As such it did not lay the foundation of a completed contract. It was merely the opening of negotiations for a contract. The plaintiffs' bid was a proposal to build, which the defendant, by the terms of its statement, had the right to reject. The facts in judgment are wholly unlike those considered in *McNeil* v. *Boston Chamber of Commerce* (1891), 154 Mass. 277, 13 L. R. A. 559, cited on behalf of the plaintiffs. In that case it was found that the defendant had agreed with the bidders to accept the lowest bid, and accordingly was held liable for a breach of that agreement. But in the present appeal that essential fact is wanting. The judgment of the supreme court of Massachusetts proceeds throughout on the assumption that that fact is an essential premise to the conclusion reached, and we think the principles declared by that learned court in that opinion are in no respect discordant with the judgment we are about to pronounce. No claim is advanced in the petition looking to a recovery for fraud or deceit in making the proposals for bids. It is, indeed, asserted that the defendant rejected the plaintiffs' bid 'without cause, arbitrarily and capriciously, through favoritism and bias.' But, if the defendant had the absolute right to reject any and all bids, no cause of action would arise to plaintiffs

because of the motive which led to the rejection of their bid. The right to reject the bids was unconditional. Defendant was entitled to exercise that right for any cause it might deem satisfactory, or even without any assignable cause. Whatever its rules or practice as to the acceptance of bids may have been, plaintiffs' rights cannot be justly held to be greater than those conferred by the published advertisement on which their bid was made. That advertisement was not an offer of a contract, but an offer to receive proposals for a contract. *Spencer* v. *Harding* (1870), L. R. A. 5 C. P. 561. There is no suggestion that the offer was not made in good faith. On the facts stated, we see no just ground on which the defendant can be held liable. We think the learned trial judge was right in sustaining the demurrer to the petition. The judgment is affirmed."

It must be apparent to this Court that ample evidence was introduced in the trial of the case to justify the court below in finding as a matter of fact that the parties fully understood and intended that no contract should be treated as having been finally made until the same was reduced to writing and approved as to its contents by the mayor and council. The very fact that the appellant tendered a written formal contract and demanded its execution is to our minds conclusive evidence of the fact that he intended that such a contract should be made and no other. For if none were required why tender a formal contract and demand its execution?

A careful examination of the contract tendered will lead to no other conclusion than that the court below was amply justified under the facts of this case in holding that it was the intention of the parties to complete the contract

only upon the performance of the conditions precedent, namely, the execution of approved bond and the execution of written instruments. And as heretofore stated that finding is binding upon this court in the determination of the fact of intention of the parties.

The entire argument of the appellant proceeds upon the false premise that the award was intended to complete the contract. If, as found by the court below, from the evidence, that the parties intended to complete negotiations by means of a written contract embracing all the terms and conditions of the specifications for the performance of the work as well as any other detail of the same and added thereto the execution and approval of bonds, then all the authorities cited by appellant fall of their own weight and cannot be applicable as authority for the contention here made, that the contract was complete in itself, and that nothing remained to be done after the acceptance of the bids and the resolution to award a contract.

We maintain that to award a contract means, and was intended to mean, in this case, by the parties to the same, that the council determined that upon a satisfactory formal contract being executed with the requirements of the statute complied with, then, unless otherwise determined by the council, it would enter into a formal contract.

Comment Upon Appellant's Authorities.

In connection with this argument we desire to review some of the authorities presented by appellant in support of his contention that this is a completed contract.

The Court will bear in mind the nature of this suit, that it is an injunction to prevent any other person than the appellant from doing any work of improving the streets set forth in the bill, other than himself, brought more than two months after the work had been under way. The appellees and the Conway Company entered into a contract and the work was completed under a contract entirely different from that alleged to have been entered into between appellant here, and which the appellant is seeking damages in this case now, yet this action is founded in equity to prevent the alleged unlawful interference by the appellees in his right to construct the improvements under his alleged prior right.

Bearing in mind this distinction throughout the entire argument, we maintain that the case of *Fort Madison v. Moore*, 80 N. W. 527, cited by appellant, is not in point. In that case the court expressly held that the contract was completed; in fact the work was done under it and upon a suit on a bond given by the contractor, it was held that successful defense cannot be maintained where the parties had treated the contract as completed and performed.

In the case of *Ross v. Stackhouse*, 16 N. E. 581, the

doctrine of estoppel against the property owner was announced by the court, suit in that case having been brought after the work had been completed.

Appellant seems to rely upon the doctrine laid down in the case of *Illinois Trust & Savings Bank* v. *The City of Arkansas City*, 76 Fed. 285.

An examination of this case shows that the contract relied upon had been in force for a period of four years, the city accepting the benefits thereof, and the company performing all its obligations thereunder. The court expressly held in that case that the ordinance passed was within the power of the city, under the statute, and both parties to the franchise contract had agreed to the terms thereof, the record of the council had been made, the company had filed its written acceptance and bond, and there was nothing further to be done, the contract was positive and definite, and so held by the court in declaring that the minds had met on all the terms thereof, and after user by the city of hydrants provided for in the franchise contract for four years, the city would not be permitted to claim that there was no contract. Note, however, the difference between that case and the case at bar. Did the minds of the parties here meet? Had all necessary steps been taken on the night of November 4th? Had all the essential elements necessary under the statute and the resolution been complied with? Was it completed or was it merely a negotiation leading up to the execution of a binding obligation

within the twenty day period specified in the proposals? It requires to our mind no argument to show the difference in the two cases.

In the case of the *City of Chicago* v. *Greer*, 9 Wall. 726, 19 L. Ed. 769, a suit for damages for failure to receive hose manufactured by Greer for the city of Chicago, part of which hose was in actual use by the fire department of the city, the court held the city liable under the terms of its contract. In this case no brief was filed by the appellant and nothing showed in the record that the parties had not executed the contract.

The case of *Harvey* v. *U. S.*, 15 Otto 671, 26 L. Ed. 1206, was a suit for damages growing out of the construction of a coffer dam in connection with the construction of a bridge between Rock Island and Davenport. After the completion of the work, the contractor, Harvey, filed a claim with the Court of Claims of the United States for extra compensation and the United States Supreme Court in passing on this question found that the contract had been duly signed and interchanged and the question decided was whether the contract embraced the coffer dam work or not, and upon the theory of a mistake of the parties permitted the original contract to be reformed, to the extent of enabling the contractor to receive just compensation for the work done.

The case of *Garfield* v. *The U. S.*, 3 Otto 242, 23 L. Ed. 779, the court held that under the requirements of the post-

office department and by long continued usage in that department the manner of executing contracts by the Postmaster General was sufficient under the statute. All the details and requirements of the department were made in the proposal to carry the mails and in the appellant's acceptance of same nothing remained to be done. The minds of the parties had met on every detail.

In the case of *Raud* v. *Mayor*, 83 N. Y. Rep. 254, the court based its decision upon the statute of New York then in force, which provided that the contract should be deemed confirmed at the opening of the bid.

In the case of *People ex rel. Ryan* v. *Mayor*, 31 N. Y. Sup. 920, the court denies mandamus and did not recognize any other theory than that if a contract existed, suit for damages for breach thereof was the only action that would lie.

The case cited by appellant of *Smith* v. *Mayor*, 10 N. Y. Rep. 504, we have been unable to find, but the Court must bear in mind that all New York cases cited are based upon the statute of New York referred to in the case of *Raud* v. *Mayor*, above referred to.

In the case of *McManus* v. *The City of Boston*, 50 N. E. 607, a case involving the proper construction of the statute of frauds in and about the purchase of real estate, the court held that the ordinance passed by the city, directing the purchase of this particular tract of land by the Street Commissioner, and the record of the vote took the trans-

action out of the statute of frauds. The case shows that McManus accepted the communicated offer of the commissioners and the court held the city bound likewise by the commissioners accepting the plaintiff's offer to sell and under the particular facts of that case the court held that it was a binding contract, at least sufficient to satisfy the statute of frauds.

We desire, however, to call the Court's attention to the distinction between this case as an executed contract of purchase of real estate by a municipality and the case at bar, which is a contract for a public improvement, in which the council was exercising delegated governmental powers involving judgment and discretion, and that the *award* here made is only one step necessary under our statute to eventually bring about the executed contract.

The appellant contends that like the McManus case, the acceptance of the bid and the award of the contract to him, ended all negotiations. A simple answer to this contention is, that one of the essential elements under the statute to complete the contract between the appellant and the city was the giving of the maintenance bond provided for in the resolution and notice. How then can it be said that the mere acceptance of the bid presented by the appellant and the award made thereon by the City Council is a completion of the contracts? In the event the appellant failed for a period of twenty days to furnish the twenty (20 per cent) per cent construction bond or the ten (10 per cent) per cent maintenance bond, satisfactory to the com-

cil, in the absence of fraud, would the contract have been enforceable or would the public improvement bonds issued by the city in payment to the appellant for the work under his contract have been valid charges against the property owners? Surely not. Therefore, the appellant assumes a false premise in his discussion of the binding force and effect of *McManus* v. *Boston*, in so far as the issue raised in this case is concerned. He assumes that every necessary detail was agreed upon, a conclusion based neither on the law nor the facts in this case.

In the case of *Willis* v. *Hoss*, 16 N. E. 800, in a suit by the property owner, the court held that where the work was done and accepted by the city and both parties recognized a contract as valid, a property owner was estopped to deny it.

that case presents an entirely different state of facts than the case at bar, wherein not only certain essential requirements remained unfulfilled between the contracting parties, but in addition thereto the action is between the parties to the alleged contract themselves.

In the case of *Denton* v. *The City of Atchison*, 8 Pac. 570 notice of acceptance of the bid was given and the work completed under the contract as entered into before any question arose thereon; nothing in that case remained to be done; all the elements of the contract were embodied in it, and upon that theory the court denied the contentions of the city.

The appellant then argues that "The legislature of Oklahoma recognized in express terms that the notice inviting bids, the plans and specifications, the accepting of the bid and awarding of the contract by the Mayor and City Council, constitutes a valid and binding contract for the making of public improvements and the statute nowhere contemplates that any other written contract shall be entered into. Sec. 725 Snyder's Compiled Laws of Okla. (in the first portion of this section) provides 'That the Mayor and City Council shall adopt a resolution reciting that no such protest has been filed (by the property owners), or the filing of such petition as the case may be, and expressing the determination of the council to proceed with the improvement, stating the material to be used and the manner of construction, and such other matters as shall be necessary to instruct the engineer in the performance of his duties in preparing for such improvement the necessary plans and plats, profiles, specifications and estimates; said resolution shall set forth in such reasonable terms and conditions as the Mayor and council shall deem proper to impose with reference to the letting of the contract and the provisions thereof.' It will be seen from this language quoted in Section 725 of the Oklahoma statutes that it is contemplated by the law that the plans, plats, profiles and specifications shall set forth the extent, character and width of the improvement and shall state the material to be used and the manner of construction and such other matters as shall

be deemed necessary to instruct the engineer to prepare the plans, plats, profiles and specifications, are a complete statement of the character and extent of the improvement and the material to be used therein, and the manner of its construction; and then in the latter part of this same section, referring to the filing of the bids and the awarding of the contract, it is said: 'At the time and place specified in such notice, the Mayor and council shall examine all bids received, and without necessary (unnecessary) delay, award the contract to the lowest bidder who will perform the work, furnish the material which may be selected, and perform all the conditions imposed by the Mayor and council as prescribed in such resolution and notice for proposals, which contract shall in no case exceed the estimate of costs submitted by the engineer with the plans and specifications.' "

Appellant loses sight of the fact that the approval resolution passed by the council is as much a part of the necessary proceedings and must be as strongly complied with as any other provision of the statute. By that resolution the contract was to be *executed* and in answer to appellant's argument we contend it could mean nothing less than an executed contract between the parties, not one in process of execution, but the executed contract. That resolution provides a forfeiture, not only for failure to *enter into a contract*, but also to *give the required bond within the required time*. The plans, specifications and profiles are but guides to the contractor; the bid is an offer to do the work; the award is the judicial determination of the council that the

bidder shall receive the contract; the notices are jurisdictional; the contract is the completed agreement of the parties.

Was there anything left in the discretion of the Mayor and councilmen after the award was made to the appellant on the 4th of November, 1908, or had all rights accrued to the appellant the moment the vote was taken? It must be apparent to this Court that the request for bids reserves the right to reject any and all bids, and leaving aside for the time being the understanding of the parties with reference to the formal contract to be executed, we maintain that the award of the contract was but an announcement, that the Mayor and council regarded the bid of appellant as the most satisfactory of any submitted, this being but another step required by statute in the negotiations which would eventually result in the execution of the contract.

It may have been necessary, as was in this case, to be further decided by the Mayor and council as to whether or not, under all the circumstances their action had been properly taken to improve the streets at a greater cost with the ten (10) year maintenance or after deliberating thereon, to determine to change their original view of the matter and improve the streets at a lesser cost by means of a five (5) year maintenance; in other words, the question of maintenance of improvement when completed was the all important question before the council and upon this proposition, as well as all others, the council acted in its

judicial capacity which cannot be questioned by the court.

It would be with just as much logic and reason that the appellant say that irrespective of the other requirements of the statute, namely, the execution of the construction and maintenance bond provided for, that the contract was *complete* upon the reception of the bid, and the vote thereon, as it would be for him to say that he had the right to a contract for these improvements, and never execute the bonds required by law. Suppose he had never given the bonds. Could he maintain that he had the right to proceed with the work of improvement? Surely not. Therefore, it is as much a part and parcel of the completed contract that approved bonds for doing this work embraced in the contract should be given as it was to submit the bid for the consideration of the council.

One of the cases relied on by appellant is that of the *American Lighting Co. of Baltimore* v. *McCuen*, 48 Atl. 352. The Court will observe from the reading of this case that it was a bill for a mandatory injunction to compel the city of Baltimore to enter into a contract for the construction of certain public work in the city of Baltimore, and the case turned upon the unauthorized act of the city solicitor to add to the contract the right of the city to discharge and employ labor for the contractor. The court in that case held that the negotiations had completely ended and the minds of the parties had met upon every detail of the contract and nothing remained to be done, under the statute,

and that the attempt of the city solicitor to add the clause concerning the employment of labor was unwarranted, uder the ordinance then in force, and that the contractor could not be compelled to sign a contract with the objectionable clause therein. That case does not bear out the contention of appellant here, that the written contract was not required.

Again in the case of *People ex rel. Lunney* v. *Campbell*, 22 N. Y. 496, nothing was decided other than that mandamus would not lie, and that a suit for damages was a proper remedy.

Another case relied upon by the appellant is that of *Argenti* v. *The City of San Francisco*, 16 Cal. 256, a suit for monies received by the city on warrants issued by the city. In this case Chief Justice Fields expressly holds that the parties accepted the contract: the work completed to the entire satisfaction of the city; the parties treated the contract as having been fully performed and the plaintiff could not be heard to complain.

In the case of *Willis* v. *Carpenter*, 25 Atl. 425, a suit growing out of the rental of a farm, the question there decided has no application to the facts or circumstances of the case at bar.

In the case of *Drummond* v. *Crane*, 35 N. E. 90, a contract to pay water rent for a period of ten (10) years at $750 per year, the court held that the contract was com-

plete, the work done and parties treated the contract as executed.

In the case of *Sanders* v. *Pulitzer*, 39 N. E. 75, by a majority of the court the contract was sustained, but in that case the court held that the contract was complete and that the parties could not add requirements in the formal contract that were not embraced in the correspondence. There was a complete acceptance in writing after communication and the court bound the parties thereto. That case is clearly distinguishable from the case at bar, in that the contract here was not complete, lacking the essential elements to make it so, namely, the communication to the appellant and the execution of the bonds, as well as the agreement to execute a formal contract.

In the case of *Post* v. *Davis*, 52 Pac. 903, cited by appellant, being a suit growing out of the leasing of a pasture, it was expressly found that the letters and telegrams constituted the complete contract.

In the case of *Rankin* v. *Mileham*, 53 S. E. 854, it became a question of fact and found by the jury that the parties did not enter into a formal contract.

And in the case of *Blaney et al.* v. *Hoke*, 14 Ohio St. 292, the question as to the completion of the contract was also left to the jury, which found that it was complete, and in passing on this question the court says that where the agreement between parties is that anything more shall be done and the constract shall be reduced to writing, it is

incomplete until it is so reduced to writing, it is incomplete until it is so reduced to writing.

In the case of *Roberts v. First National Bank*, 79 N. W. 993, all that is decided is, that the intervenor being a stranger to the agreement could not raise the question as to the completion of the contract.

Following these and other authorities which, as we maintain, are not in point in this case, the appellant reasons that the contract was complete the moment the award was made and that the appellees should be enjoined from permitting the execution of the work under the entirely different contract entered into between appellees and the Conway Company.

The entire argument of appellant is ingenious, to say the least, in the face of the record in this case, as shown by the statement of the appellant himself, who as president of the Parker-Washington Company, executed numerous contracts with the appellees and by the procedure of the City Council, as testified to by the witnesses, Hess and Scales. It was understood and agreed between the parties that no contract should be treated executed until the written contract and the bonds required were approved and accepted between the parties.

We desire in this connection to call the attention of this Court to the specifications found on page 42 of the printed record, which reads, "The first parties agrees to commence the work embraced in this contract within——

days after signing the same." And again we desire to call the attention of this Court to the form of proposal of the appellant found at page 146 of the printed record, which reads, "I agree to commence work within —— days after signing the contract, etc." And again to the notice to the bidder, which requires the successful bidder to enter into a contract within the required time, namely, twenty days after the award, and to the subsequent tender of the appellant's formal written contracts and the demand that they be accepted and signed.

How, then, can it be contended that there was to be no formal contract between the parties hereto? How can it be contended that in the face of the proposal made and the check deposited by the appellant, conditioned upon the execution of the contract by him, and giving of the required bond, that the parties did not intend to execute a formal written contract? What is meant by the *signing* of a contract? What is meant by the *entering into* a contract? Certainly nothing less than the parties to the same agree that upon the acceptance of the proposal legally communicated, a legal binding contract, embracing the terms of the specifications and the nature of the improvement would be embodied in the written document to be signed by them.

The court below heard the testimony of the witnesses and found that it was not the intention of the parties to be bound, all the requirements of the law to the execution of the bonds, as well as the reduction of the various propo-

sitions to form, was intended and they merely negotiated until such time as the contract might be entered into. The court expressly found at page 69 of the printed record, "It is therefore clear that it was an understanding of both parties that the contract was not complete until it should be properly executed in writing." A clear finding of fact by the trial court as to what was the intention of the parties relative to the action of the council upon the submission of the bid.

We therefore respectfully submit to this Court that the appellant is precluded here from raising the question of fact relative to the intention of the parties hereto concerning the execution of a formal contract, that question having been passed on by the court below and decided upon the evidence submitted that the intention was to execute the formal contract; that finding carries the same force where there is some evidence to sustain it as is the verdict of the jury upon a like question and will not be reviewed on appeal.

Wimgirt v. *First Nat'l. Bank*, 176 Sup. St. Mch. 11, 1912.

Horn v. *Gibson*, 103 Pac. 563.

Campbell v. *U. S.*, 2161 Sup. Ct., Mch. 18, 1912.

Mason v. *Smith*, 191 Fed. 502.

Board of Commissioners v. *Irvin*, 126 Fed. 698.

Southern Pacific Ry. Co. v. *U. S.*, 186 Fed. 737.

Nashville Heat & Light Co. v. *Baur*, 168 Fed., at 865.

Aetna Indemnity Co. v. *J. R. Crow Coal & Mining Co.*, 154 Fed., at page 545.

U. S. Fidelity & Guaranty Co. v. Board of Commissioners, 145 Fed., at page 151.

The specifications in the case at bar called for bids on two different periods of maintenance guarantee. The right was reserved to reject bids. All bids under the ten year guarantee were rejected, and no bid of the class which appellant made was ever adopted.

The city clearly retained the right to exercise this privilege, and plaintiff was aware of this reservation; and in at first deciding to accept appellant's bid, under the ten year guarantee, it gave up no right to make a subsequent rejection of the ten year bids; and to exercise its more mature judgment in that respect for the best interests of the persons whose property was to be affected.

Appellant in this transaction contracted with the city, with the knowledge that it was simply acting under legislative functions, imposed by the statute, relative to constructing public improvements and assessing the cost thereof against the property owners. The plaintiff knew that the city, as such, had no business interest in this transaction. That it was seeking no profit, and incurring no liability of the city as such, for the appellant was to be recompensed in bonds to be paid out of the proceeds of special assessments against the property improved. That no liability was being incurred by the city and that its acts were legislative only, delegated to it by the state as a method of carrying out this particular function of government.

In every manner possible, by warning in the notice asking for bids, by the provisions of the specifications, by the uniform custom previously adhered to and conformed to upon other occasions by the plaintiff, and by the emphatic acquiescence of plaintiff in his bid, wherein he stipulates "*to commence work —— days after the signing of the contract*," the city impressed upon the appellant the fact that the end of the negotiations were yet in the future; and that the consecutive consummated acts were merely steps leading to a final contract.

It was the duty of the city officials to protect the interests of the property owners. Discretion was lodged in them for that purpose. They were to decide what was the best bid; whether any of the bids were good or not, and to put such stipulations in the contract as would protect the property owners, who were not permitted by any formula to protect themselves.

The reservation of the right to reject bids was notice of the intent of the city to retain control of the letting of the work until the city officials were finally and fully satisfied that the best interests of the property owners were being wholly conserved.

Much has been said and many cases cited in plaintiff's brief in an effort to bring the acts of the city in this case under the rule applicable to individuals in contracting with one another. Our contention is, even under such a construction, that in this case a contract had not been con-

summated; however, this transaction should not be viewed from such a standpoint. The city was exercising only delegated legislative authority in making the contemplated improvements, and were invested with delegated power and discretion wherewith to safeguard the interests of the property owners and to enforce the payment of compensation to the contractor through the issuance of special tax bills. Only by force of the statute were they acting. No interests of the city as such were involved. No fraud is alleged, but because of the misjudgment, if such it be, of the city officials charged with this duty, now the appellant seeks to recover damages directly from the municipality and to punish the taxpayers in damages, when, even if he had completed the improvements the appellant could not have recovered his compensation from the city, but must have looked therefor to the property owners.

We feel sure that this Court on an examination of the record and pleadings in this case cannot reach any other conclusion than that the lower court was right in its findings of fact and conclusion of law that the parties dealing with each other upon the basis of public contract work, with the rights and privileges incident thereto, understood and intended that no contract should exist between the parties until formally executed. And upon this proposition rests

the entire case. Of course, the essential elements of the contract must be present, the minds must have met, the consideration must be there and the communication of the acceptance must be shown.

We maintain the proposition that neither one of the essential elements necessary to make a binding contract is in this case, therefore of necessity the appellant has no rights to maintain in this court.

While this brief has been extended and enlarged beyond the requirements of the case, yet we have endeavored to give a full and complete statement of our position to the Court as we believe the facts and the law justify herein.

After all, the issue is a simple one. Much might be said upon the equity power of this Court, the right to mandatory injunction, and specific performance, and numerous authorities cited upon those propositions in addition to those already cited, yet we believe firmly that this Court will take the one view of this case: Is this or is this not a valid binding contract between the parties, taking into consideration, of course, on appeal and review only errors committed by the court below upon the application of the law to the facts as found upon this particular question?

With faith that the position of the appellee is, and at all times has been right, and that in the performance of its

duty it has served the best public interests and has acted strictly in compliance with law, this cause is submitted to the consderation of this Court with the firm assurance, as we believe, that this Court will affirm and sustain the decision of the United States Circuit Court of Appeals for the Eighth Circuit, in affirming the decision of the District Court of the Western District of Oklahoma.

Respectfully submitted,

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